



SEXUAL HARASSMENT PREVENTION

This reference guide discusses harassment and identifies its various forms as defined under the law and covers the different methods to prevent harassing behavior, management responsibilities, policies and the role of human resources for California based organizations.

UnitedAg



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Sexual Harassment Prevention

AB 1825

What does the law mandate?

“An Employer Must Take All Reasonable Steps Necessary to Prevent Sexual [and other] Harassment”

- **Policy**
- **Training**
- **Investigation**
- **Immediate & Appropriate Corrective Action**
- **Follow up**

This law applies to all California employers with 50 or more employees must provide two hours of sexual harassment prevention training, to their supervisors and managers, every two years, starting 2005.

Which Employers are Covered?

- All employers doing business in California with 50 or more employees or contractors
- All state and local municipalities, regardless of the number of employees
- Only those supervisors (of a multi-state employer) located in California need to be trained
- Employees who are hired or promoted into a supervisory/management role must attend the training within six months of the promotion or appointment.

For more detailed information on this law, you may refer to the following labor code:

California Government Code §12950.1

12950.1. (a) By January 1, 2006, an employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position. Any employer who has provided this training and education to a supervisory employee after January 1, 2003, is not required to provide training and education by the January 1, 2006, deadline. After January 1, 2006, each employer covered by this section shall provide sexual harassment training and education to each supervisory employee in California once every two years. The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. (b) The state shall incorporate the training required by subdivision (a) into the 80 hours of training provided to all new supervisory employees pursuant to subdivision (b)

of Section 19995.4, using existing resources. (c) For purposes of this section only, "employer" means any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. (d) notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant. (e) If an employer violates this section, the commission shall issue an order requiring the employer to comply with these requirements. (f) The training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.

The Department of Fair Employment and Housing (DFEH)

- Accepts complaints of discrimination,
- Investigates those complaints,
- Issues accusations and
- Prosecutes those cases both before the Fair Employment and Housing Commission and in court.

As part of its routine investigation of any complaints filed, the DFEH now asks every employer subject to AB 1825 in every employment discrimination case whether it has provided its supervisors sexual harassment training.

Minimum Prevention Steps for Employers

Provide AB 1825 compliant sexual harassment training.

Create an anti-harassment policy and train all employees about that policy.

Distribute an information sheet to all employees about sexual harassment. Employers can use the information sheet developed by the DFEH, numbered **DFEH-185**, and available on its website, at www.dfeh.ca.gov or develop a comparable sheet on their own.



The definition of sexual harassment includes many forms of offensive behavior.



Department of Fair Employment and Housing

- such as a lead, supervisor, manager or agent;
- the employer had no knowledge of the harassment;
- there was a program to prevent harassment; and
- once aware of any harassment, the employer took immediate and appropriate corrective action to stop the harassment.

Filing a Complaint

Employees or job applicants who believe that they have been sexually harassed may file a complaint of discrimination with DFEH within one year of the harassment.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to either a public hearing before the Fair Employment and Housing Commission or a lawsuit filed by DFEH on behalf of the complaining party.

If the Commission finds that discrimination has occurred, it can order remedies including:

- Fines or damages for emotional distress from each employer or person found to have violated the law
- Hiring or reinstatement
- Back pay or promotion
- Changes in the policies or practices of the involved employer

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

For more information, see publication DFEH-159 "Guide for Complainants and Respondents."

For more information, contact DFEH toll free at **(800) 884-1684**
 Sacramento area & out-of-state at **(916) 478-7200**
 TTY number at **(800) 700-2320**
 or visit our Web site at www.dfeh.ca.gov

In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.



State of California
 Department of Fair Employment & Housing

Sexual Harassment

The Facts About Sexual Harassment

The Fair Employment and Housing Act (FEHA) defines sexual harassment as harassment based on sex or of a sexual nature; gender harassment; and harassment based on pregnancy, childbirth, or related medical conditions. The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser. The following is a partial list of types of sexual harassment:

- Unwanted sexual advances
- Offering employment benefits in exchange for sexual favors
- Actual or threatened retaliation
- Leering; making sexual gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
- Making or using derogatory comments, epithets, slurs, or jokes
- Sexual comments including graphic comments about an individual's body; sexually degrading words used to describe an individual; or suggestive or obscene letters, notes, or invitations
- Physical touching or assault, as well as impeding or blocking movements

Post a copy of the DFEH anti-harassment poster **DFEH-162** (which can also be downloaded from the DFEH website).



Discrimination and Harassment in Employment are Prohibited by Law

Laws enforced by the California Department of Fair Employment and Housing (DFEH) protect you from illegal discrimination and harassment in employment based on:

- Race
- Color
- Religion
- Sex (includes pregnancy, childbirth, and related medical conditions)
- Gender, gender identity, and gender expression
- Sexual orientation
- Marital status
- National origin (includes language use restrictions)
- Ancestry
- Disability (mental and physical, including HIV and AIDS)
- Medical condition (cancer, or a record or history of cancer)
- Genetic information
- Age (40 and above)
- Denial of family and medical care leave
- Denial of pregnancy disability leave or reasonable accommodation

The California Fair Employment and Housing Act (Part 2.8 commencing with Section 12900 of Division 3 of Title 2 of the Government Code) and the Regulations of the Fair Employment and Housing Commission (California Code of Regulations, Title 2, Division 4, Sections 7285.0 through 8504):

- Prohibit harassment of employees, applicants, and independent contractors by any persons and require employers to take all reasonable steps to prevent harassment. This includes a

ployee or job applicant's religious beliefs and practices.

- Require employers to reasonably accommodate employees or job applicants with a disability in order to enable them to perform the essential functions of a job.
- Permit job applicants and employees to file complaints with the DFEH against an employer, employment agency, or labor union that fails to grant equal employment as required by law.
- Prohibit discrimination against any job applicant or employee in hiring, promotions, assignments, termination, or any term, condition, or privilege of employment.
- Require employers, employment agencies, and unions to preserve applications, personnel records, and employment referral records for a minimum of two years.
- Require employers to provide leaves of up to four months to employees disabled because of pregnancy, childbirth, or a related medical condition.
- Require an employer to provide reasonable accommodations requested by an employee, on the advice of her health care provider, related to her pregnancy, childbirth, or related medical conditions.
- Require employers of 50 or more persons to allow eligible employees to take up to 12 weeks leave in a 12-month period for the birth of a child; the placement of a child for adoption or foster care; for an employee's own serious health condition; or to care for a parent, spouse, or child with a serious health condition. (Employers are required to post a notice for their employees of their family and medical leave

UnitedAg (UAL) Policy:

It is the policy of UAL to maintain a working environment which encourages mutual respect, promotes respectful and congenial relationships between employees and is free from all forms of harassment of any employee or applicant for employment by anyone, including supervisors, co-workers, vendors or customers. Harassment in any manner or form is expressly prohibited and will not be tolerated by UAL. Accordingly, UAL management is committed to vigorously enforcing this policy against harassment, including but not limited to sexual harassment, at all levels within UAL.

Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where:

1. Submission of such conduct is an explicit or implicit term or condition of employment;
2. Employment decisions are based on an employee's submission to or rejection of such conduct; or,
3. Such conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

The term "harassment" may also include conduct of employees, supervisors, vendors and/or customers who engage in verbally or physically harassing behavior which has the potential for humiliating or embarrassing an employee of UAL.

All reported or suspected occurrences of harassment will be promptly and thoroughly investigated by an officer of UAL or by an independent member of the senior staff or outside/independent and qualified investigator. The investigation will be thorough. It will include, but not be limited to, interviews with the victim and alleged perpetrator, interviews with witnesses, review of any documents or written materials, review of email communications, etc.

Where harassment is determined to have occurred, UAL will immediately take appropriate disciplinary action, including written warnings and possible suspension, transfer and/or termination.

UAL will not permit or condone any acts of retaliation against anyone who files harassment complaints or cooperates in the investigation of same.

The term "harassment" includes but is not limited to unwelcome slurs, jokes, verbal, graphic or physical conduct relating to an individual's race, religion, sex, sexual orientation, age, national origin or disability.

The Company desires to avoid misunderstandings, complaints of favoritism, possible claims of sexual harassment and the employee morale and dissension problems that can potentially result from personal or social relationships involving managerial and supervisory employees in the



Company. Accordingly, managers and supervisors are prohibited from becoming romantically involved with one another or with any subordinate employee in their chain-of-command or with any non-management employee of the facility owned or operated by the Company.¹

Company policy prohibits *More Than “Unlawful” Harassment*:

- *Any* unwelcome conduct directed to persons of the opposite sex or persons of the same sex is prohibited by the policy
- Conduct need not be “severe or pervasive” to subject an employee to discipline

Any form of harassment including:

- Protected Categories
- Hostile work environment harassment
- Tangible employment harassment
- Any behavior, if directed at someone because of his/her sex, race, age, religion, national origin, ancestry, disability, marital status, pregnancy, sexual orientation or any other protected characteristic protected by law
- Any conduct that is inappropriate, unwanted, abusive or interferes with work performance

Policy Also Prohibits *More Than “Unlawful” Harassment*:

1. *Any* unwelcome conduct directed to persons of the opposite sex or persons of the same sex is prohibited by the policy
2. Conduct need not be “severe or pervasive” to subject an employee to disciplinary action

Know where to find your policy, e.g., in the employee handbook, company intranet, postings, etc.

¹ Employee Handbook, pages 7 – 8

What is sexual harassment?

It consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where:

- Submission of such conduct is an explicit or implicit term or condition of employment;
 - Employment decisions are based on an employee's submission to or rejection of such conduct; or,
 - Such conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment
-

Tangible Employment Action

- What is tangible employment action?
 - Quid Pro Quo
 - Job or job benefits conditioned on sexual favors
- Use of threats or rewards by the manager to get what they want
- Generally involves relationships between a manager and his/her direct report.

Examples:

- The obvious:
 - "Give me a date, I'll give you a raise"
- The not so obvious:
 - "I can make things really easy for you here"
 - A poor review on the heels of a romantic rejection

Aside from the more obvious problem of a relationship going bad, workplace relationships can adversely affect others, e.g. sexual favoritism.

#1. When the harassment leads to a tangible employment action, such as demotion, decreased compensation, significantly different work assignments, or termination, the employer's liability is absolute.

No Tangible Action

#2. When there has been no tangible employment action, the employer is liable unless it can prove that: It has taken reasonable care to prevent and correct promptly any sexually harassing behavior (such as widely disseminating an effective policy and complaint procedure) and The employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Hostile Work Environment

The legal definition:

(1) *Unwelcome* visual, verbal or physical conduct that is (2) *based on sex or of a sexual nature* that (3) *unreasonably interferes* with job performance or (4) creates an *abusive work environment*. Ask for examples of the types of things that can create a hostile work environment. For instance, off color jokes can create a hostile environment. Other examples: posters, remarks, looks, gestures.

Important note: Unlike *quid pro quo* cases, most of the time a hostile environment harassment is **not intended**. This is especially true where women enter a predominantly male workforce.

Another important note: **the behavior need not be aimed at the victim to be considered hostile environment harassment**. A group of employees telling crude jokes could offend an employee even though they were not talking to or about the employee.

What does the definition really mean?

- Where is the “environment”?
- Who can be a “harasser”?
- When is conduct “unwelcome”?
- When does conduct become “abusive” or “unreasonably interfere” with work?

What constitutes a “hostile” environment?

What is environment?

- What employees *see*
- What they *hear*
- What enters their “personal space”

Example: A person staring into another’s cubical could be harassment.

The Environment Includes:

- The Office
- Lunches (“off the clock”)
- Business trips (“off the premises”)
- Parties / Social Gatherings
- **Emails**
- Internet browsing
- Downloads
- Instant Messaging

A note about email: it is always recoverable. It is never truly deleted, and can almost always be retrieved - **Avoid forwarding**

Who can be a harasser?

- Supervisors
- Co-workers
- Third parties
(Customers, Vendors, Business Partners)

Most people are aware that a supervisor can be liable for sexual harassment. However, these days we are seeing a lot of suits claiming harassment by co-workers that the supervisor condoned or failed stop.

Also, sexual harassment liability can arise from the conduct of third parties. In one case the Ninth Circuit held that the employer is liable for harassment by customers where the employer knew about the harassment and took no action to stop it.

Severe or Pervasive:

When, taken as a whole, it is “severe **or** pervasive” enough to alter the victim’s working environment

- “**Severe**” conduct can include:
 - threatening or violent physical contact
 - “**Pervasive**” conduct can include:
 - continuous and concerted unwelcome comments
 - combination of contact and comments
 - **One** extremely offensive act can constitute sexual harassment. So can **several less offensive acts** (emails, jokes, compliments)
-

What common forms of harassment can you think of?

The obvious:

- Unwanted touching
- Impeding or blocking movements
- Sexual jokes
- Pornographic pictures, emails, etc.
- Repeated, unwelcome proposals

The not so obvious:

- Leering
- Confiding intimate information
- Sexual jokes between friends overheard by others
- Cursing, berating, or belittling

Protected Categories

Protected Classes **Title VII** of the Civil Rights Act of 1964 prohibits discrimination on account of:

1. **Race or Color** This category includes blacks, whites, persons of Latino or Asian origin or descent, and indigenous Americans (Eskimos, Native Hawaiians, Native Americans). The prohibition on discrimination based on "color" also has been interpreted by some courts to mean that a light-skinned black worker could pursue a discrimination case based on the actions of her darker-skinned supervisor. See, e.g., *Walker v. Secretary of Treasury, IRS*, 742 F. Supp. 670 (N.D. Ga. 1990), *aff'd*, 953 F.2d 650 (11th Cir.), *cert. denied*, 506 U.S. 853 (1992).
2. **National Origin** The Supreme Court has interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973). The term does not include discrimination based solely on a person's citizenship. *Id.*; *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

The courts have generally upheld requirements that an employee be able to communicate in English, where the requirement is job-related. See, e.g., *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981). The EEOC's position is that a rule requiring bi-lingual employees to only speak English at work is a "burdensome term and condition of employment" that presumably violates Title VII and should be closely scrutinized. 29 C.F.R. ♦ 1606.7(a). Courts that have considered the issue, however, have generally upheld English-only rules. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

Discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question. The employer must show that the discriminatory practice is "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. ♦ 2000e-2(e)(1). The courts and the EEOC interpret the BFOQ exception very narrowly. See 29 C.F.R. ♦ 1604.2(a).

Protected Categories (continued)

3. Sex This provision prohibits discrimination based on gender, and applies to both men and women. Employer rules or policies that apply only to one gender violate Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (rule prohibiting having children applied only to women). Employers also may not provide different benefits to women than to men. *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below. In 1978, Congress amended Title VII to make it clear that the statute prohibited discrimination because of pregnancy. 42 U.S.C. ♦ 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. Employers must treat pregnancy-related disabilities in a similar fashion to other disabilities that similarly affect an employee's ability to work. Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question
4. Religion The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. ♦ 2000e-(j). The EEOC Guidelines state that protected religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. ♦ 1605.1. ²

Other protected categories:

- Gender
- Color
- Disability
- Medical Condition
- Marital Status
- Age
- Sexual Orientation
- Pregnancy

² <http://www.hr-guide.com/data/G714.htm>

Is it harassment or good natured humor?

Where do you draw the line?

Laws prohibiting harassment are not intended to establish a “general civility code for the American workplace.”

Intent vs. Perception:

Conduct is unwelcome when the victim is offended:

- Intent to harass is NOT necessary
- The issue is perception -- not intent

Equal Opportunity Harasser: The Ninth Circuit issued an opinion in a case where an employee yelled and behaved in a hostile and intimidating way towards both male and female employees. The court found the conduct was harassment because the women felt threatened while the men did not. Conduct that was not sexual and was aimed at men and women was still found to be harassment because it affected the women differently than the men.

Contrast the decision in the *Friends* sitcom case: The plaintiff hired as a writing assistant on the TV show *Friends* claimed that comedy dealt with sexual matters and that part of her job would require her to listen to writers’ sexual jokes. When she was terminated due to poor job performance, the plaintiff sued for sexual harassment, alleging the writers’ use of sexually vulgar language constituted harassment. The California Supreme Court said that because such conduct was not aimed at the plaintiff or other women and because this was a creative environment, Plaintiff could **not** establish sexual harassment.

Determining Perception:

1. Was the victim actually offended?
2. Would a “reasonable person” have been offended? The courts look at both of these questions.
 - The first question goes to the victim’s subjective state of mind – was he or she actually offended? If a person welcomes or participates in the behavior, a court probably would find that person was not actually offended.
 - The second question applies an objective standard that looks at a reasonable person in the victim’s shoes. This means, the same gender and the position. Ex: The court will ask would a reasonable woman be so offended by a single off color joke that she would be forced to quit? Probably not.

When applying the reasonable person standard, the court will consider all of the circumstances. For instance, in another case, the Ninth Circuit found a racially hostile work environment where an employee of Arabic descent named Mamdouh El-Kahem was given a more western sounding

nickname of “Manny” by his boss despite repeated objections. The court found that the conduct created “a work environment racially hostile to a reasonable Arab.”

When is Conduct Unwelcome?

Intent vs. Impact (or perception)

- Who is the “Reasonable Person”?
- Same gender as the victim
- In the same position as the victim
- Must consider all of the circumstances

Many employers assert the defense that the conduct was not unwelcome because the victim provoked it or consented to it by acting in a flirtatious manner, or by sending similar e-mails to those he or she claims were offensive. Although this can constitute a viable defense, it is also true that just because someone is willing to talk about sex does not mean that person wants to be subjected to abusive sexual conduct.

When is conduct “based on sex” or “of a sexual nature”?

- The conduct need not be motivated by sexual desire
- Sexual hazing or horseplay can be harassment
- Harassment can also be based on “sexual preference”

Sexual Harassment Is Not Just Male Toward Female

- Females can harass males
- Males can harass males
- Females can harass females

What to do if you're harassed

Clearly communicate with each other - to the harasser, management, HR

- Directly
- Privately
- Conduct is unwelcome and must stop immediately
- Emphasis has been placed on what to do if someone else is harassed and how to avoid liability for harassment, but it is also important to know what to do if you are harassed. Preventing the behavior before it reaches the level of harassment is one of the best things you can do. Just say "NO"
- Oftentimes (if you're comfortable doing it) telling the harasser that their behavior is unwelcome could end the situation instantly.

Nonverbally demonstrate that conduct is unwelcome by:

- Walking away
- Using facial expressions
- Using Body language
- Avoid interactions with harasser

Next, Speak Up!

Make a Report *immediately* to:

- Your supervisor, manager, and/or
- Human Resources
- Be prepared to provide a statement **in writing** including details such as the name of the harasser and any witness(es)
- Date Your Notes!

What to Expect If You Report Harassment:

The company is required to investigate once a report has been made. The company will be as discreet as possible, but it must conduct a formal investigation. Information provided on a need to know basis.

- You will be interviewed & asked to give written details
- The alleged harasser will be confronted
- There will be an "investigation" & a conclusion will be reached
- Corrective / remedial action will be applied where warranted
- **No Retaliation** - the law prohibits retaliation against complainants

When You Observe, Or Receive A Complaint Of Harassment

Managers Have Special Obligations

If you hear or observe inappropriate conduct OR receive a complaint

Step 1: Document it

Step 2: Report it to Human Resources immediately & provide your documentation

Documentation Best Practices:

- Immediacy
- Just the Facts - avoid conclusions
- What to document:
 - Date, time, place
 - Witnesses
 - Statements, actions, reactions
 - Your response

Documentation can come in the form of a memo or email.

Your Obligations

- Be familiar with sexual harassment law and your own company's policies and procedures.
 - Take reasonable steps to prevent harassment in your workplace.
 - Have an effective complaint procedure to deal with claims, and make sure your employees are familiar with it.
 - Know how to respond to complaints and follow your employer's procedures.
 - Take all complaints seriously.
 - After you receive a complaint, make every effort to STOP the harassment.
 - Report any allegations immediately to HR or other appropriate parties.
-

What about the reluctant victim?

- “I just thought you should know but please don’t tell anyone else”
- “No one can know it was me who complained”
- “It will only make things worse”
- “It’s too embarrassing to talk about”
- “I don’t want to get anyone in trouble”
- Don’t promise not to tell – you are obligated to report it
- Don’t promise confidentiality
- Do tell them there will be no retaliation
- Do remind them of the importance of the issue
- Do tell them they can speak to someone with whom they feel comfortable

The Role of Human Resources

- Accepts complaints
- Listens and obtains written details
- Investigates (usually)
- Reaches conclusion
- Coordinates with managers regarding
- Communication in the department
- Discipline
- Follow-up

The Investigation Process:

All reports will be investigated by HR, outside investigator or outside counsel

- Interim personnel actions will be taken
- Interviews and possible re-interviews
- It will be done promptly & documented
- It will be kept *as confidential as possible*
- Accused gets an opportunity to respond
- All information is maintained in a special “Red File” while investigation is in process
- Final determination will be made
- Prompt, effective remedial action will be taken where necessary
- Results will be communicated to the accused and victim
- Post-investigation follow-up

Investigations

➤ **NEVER promise complete confidentiality**

- Anyone who makes a complaint or provides information related to such a complaint is protected from retaliation
- Don't threaten or retaliate against an employee who makes a complaint
- Assess all complaints fairly and impartially, and go into an investigation with an open mind

Issues for the investigator

"He said, She said"

The facts are rarely black & white

- Credibility of the victim / accused / witnesses
- Specifics
- Corroboration (witnesses)
- Prior complaints

Factors in Reaching a Conclusion:

- Did the conduct violate company policy?
 - Was the conduct “unwelcome?”
 - The “reasonable person” standard
- Was the conduct inappropriate
 - Stray remarks
 - Isolated acts
 - Verbal or physical?

What is appropriate corrective action?

- Must be “reasonably calculated to end the harassment”
 - can include warning, transfer, demotion, special training, termination
- Evaluate each situation but be consistent: HR will ensure consistency
- Don’t punish the victim
- Make the victim “whole”
 - can include payment for counseling, purging personnel file of tainted reviews
- Monitor the situation (be proactive with follow-up)
- Coordinate with HR to implement discipline
- Check back (follow-up) with victim periodically

The “Reasonable Person Standard”

- Since not everyone interprets behavior in the same way, the courts find that, in order to be illegal, the conduct must be severe or pervasive and offensive to a reasonable person in similar circumstances.
- Under this standard, one-time unwelcome behavior will seldom qualify as sexual harassment unless it is sufficiently severe as judged by a reasonable person.

Avoiding Harassment Claims:

- Set a positive example / Observe the “Golden Rule”
- Intervene early -- be proactive
- Never punish the messenger, encourage employees to come forward and have an open door policy
- Conduct thorough, good faith investigations
- Impose decisive corrective action when appropriate

Why is it important?

- Fastest growing claim
- Liability for retaliation is possible even where there’s been no actual harassment
- Individual manager liability

What you can do:

- Coordinate all issues with human resources
- Be proactive, don’t wait for complaints, take action if you observe inappropriate behavior

The Grandma Test

Men: Before you compliment a woman, think of how you would phrase it to your grand mother, e.g., “You look really pretty in that dress.”

Points to Remember

- Individuals can be victims of sexual harassment even if they voluntarily submitted to a sexual relationship.
- Sometimes one incident is so severe that it alone is enough for a sexual harassment claim to be successful.
- The more severe and outrageous the workplace conduct, the less frequently it must occur to constitute harassment.
- Sexual harassment doesn't have to involve sexual attraction. It can be harassment based on a person's gender.
- An individual may sexually harass someone of the same sex.
- California law protects employees from being harassed or discriminated against because of their sexual orientation.
- The key to limiting liability for sexual harassment is PREVENTION.
- You must protect your employees from harassment by customers or other third parties, as well as employees, managers, supervisors, or co-workers.
- When violence is involved in sexual harassment, there may be criminal charges as well as a harassment claim.
- Think long and hard before entering into a romantic relationship with a subordinate. Ask yourself what will happen if the relationship ends badly.
- Don't retaliate against someone who makes a sexual harassment claim, and don't let other employees retaliate either.

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