

# Harassment & Discrimination

UNDERSTANDING YOUR RESPONSIBILITIES



# Executive Blueprints

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## THE IMPACT OF SEXUAL HARASSMENT

One study found that fully 50% of women who filed a complaint in California were fired; another 25% resigned due to the stresses of the complaint process or the harassment itself. A study of federal employees reported that those who have been harassed lose \$4.4 million in wages and 973,000 hours in unpaid leave each year.

90% to 95% of sexually harassed women suffer from some debilitating stress reaction, including anxiety, depression, headaches, sleep disorders, weight loss or gain, nausea, lowered self-esteem and sexual dysfunction.

The costs are borne not only by the victims of harassment; they create financial havoc for employers as well.

Sexual harassment costs a typical Fortune 500 company \$6.7 million per year in absenteeism, low productivity and employee turnover. That does not include additional costs for litigation expenses, executive time and tarnished public image should a case wind up in court.

## PERSONAL LIABILITY

### Harassers Are Personally Liable

If you, as an employee, are found to have engaged in sexual harassment, or if you as a manager know about the conduct and condone or ratify it, you may be personally liable for monetary damages.

Your company does not have to pay for damages assessed against you personally. In addition, the company may take appropriate disciplinary measures, including termination, against any employee who engages in sexual harassment.

**\* Silence + Knowledge = Consent**

## CALIFORNIA AB1825

Organizations with 50 or more employees must provide all supervisory personnel with the following:

- Two hours of sexual harassment training within one year of January 1, 2005
- Sexual harassment training and education once every two years

“More than 50 employees” includes organizations that regularly employ 50 or more persons, including independent contractors and temporary personnel.

A “Supervisor” is any individual having the authority 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 the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” This language does not refer to title of manager or supervisor. It refers to individuals who exercise a position of authority or decisions over others, including contracted or temporary personnel. (You do not need a title to be in this role.)

**Training must be of high quality and conducted via a classroom or other interactive training, and include the following topics:**

- ✓ Information and practical guidance regarding federal and state statutory laws about sexual harassment
- ✓ Information about correction of sexual harassment and the remedies available to victims of sexual harassment
- ✓ Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation

**Training does not automatically protect an employer from liability in the event of a sexual harassment claim. However, failure to maintain legal compliance places the employer at much Higher Risk.**

## SEXUAL HARASSMENT DEFINED

Sexual harassment as defined by the United States Equal Employment Opportunity Commission (EEOC):

*“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.”*

- ✚ The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- ✚ The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- ✚ The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- ✚ Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- ✚ The harasser's conduct must be unwelcome.

### California Law defines the following types of harassment

**Verbal Harassment** – Epithets, derogatory comments or slurs

**Physical Harassment** – Assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual

**Visual Harassment** – Derogatory posters, calendars, cartoons or drawings

**Sexual Favors** – Unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors

**Gender Harassment** – Due to pregnancy, childbirth or related medical conditions



## TYPES OF SEXUAL HARASSMENT

### Quid Pro Quo:

Quid pro quo sexual harassment occurs when an individual's submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for employment decisions affecting the individual or the individual's submission to such conduct is made a term or condition of employment

- ✚ It is sufficient to show a threat of economic loss to prove quid pro quo sexual harassment.
- ✚ A single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.
- ✚ Courts have held employers strictly liable for quid pro quo sexual harassment initiated by supervisory employees.
- ✚ A subordinate who submits and then changes her or his mind and refuses can still bring quid pro quo sexual harassment charges.

### Hostile Environment:

Hostile environment sexual harassment occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates a hostile, intimidating or offensive work environment even though the harassment may not result in tangible or economic job consequences, that is, the person may not lose pay or a promotion.

There are two conditions that determine liability for employers in cases of hostile environment sexual harassment:

- ✚ The employer knew or should have known about the harassment, and
- ✚ The employer failed to take appropriate corrective action

An employer can be held liable for the creation of a hostile environment by a supervisor, by non-supervisory personnel, or by the acts of the employer's customers or independent contractors if the employer has knowledge of such harassment and fails to correct it.

An employer may be expected to know about the hostile environment

- ✚ if there was a complaint to management
- ✚ if management failed to establish a policy against sexual harassment
- ✚ if the harassment is openly practiced or well-known among employees.

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## FEDERAL LAW

There are Federal and State Laws pertaining to Discrimination and Harassment.

### Federal Law

**Title VII of the Civil Rights Act** prohibits harassment of an employee based on race, color, sex, religion, or national origin.

**The Age Discrimination in Employment Act (ADEA)** prohibits harassment of employees who are 40 or older on the basis of age

**The Americans with Disabilities Act (ADA)** prohibits harassment based on disability.

**All EEOC Statutes** prohibit retaliation for complaining of discrimination or participating in complaint proceedings

Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under the EEOC statutes.

Federal law does not prohibit simple teasing, offhand comments or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a “tangible employment action,” such as hiring, firing, promotion, or demotion.

## DISCRIMINATION

### What is Discrimination?

Discrimination covers actions taken against people because of their membership, perceived membership, or associated membership in certain protected classes. Discrimination means treating people differently, and disadvantageously, compared with other people not in the same class. Remember that everyone is part of a protected class. Everyone has a race and marital status, is perceived as one gender or another, and associates with people in protected classes.

### Disparate (unequal) treatment

Employee or Applicant is treated differently, specifically because of his or her protected class status

### Disparate (unequal) impact

Employment practice that appears neutral on its face but is discriminatory against protected classes in practice (unequal requirements)

### Examples of discrimination

- ✚ Base employment decisions (hiring, firing, promotions, benefits, etc) on protected class status
- ✚ Rely on stereotypes to judge competence, qualification, or intelligence
- ✚ Any employment action that has adverse impact on hiring, training or promotion or retention of employees in a protected class
- ✚ Engage or permit employees to engage in harassment of a protected class
- ✚ Act on perception of disability without evaluating fitness for a particular job
- ✚ Retaliate against an employee, applicant or contractor for opposing harassment or discrimination, filing a complaint, assisting in an investigation, etc
- ✚ Refuse to honor an otherwise eligible employees request for pregnancy disability leave under CFRA or FMLA
- ✚ Refuse to accommodate religious requirements
- ✚ Inquire on a job application if the applicant has ever been arrested

## **SB1809 SUE YOUR BOSS LAW**

The original law, effective 1/1/04, under Senate Bill 796, allowed individual employees and attorneys to sue for alleged violations and bypass state agency enforcement. SB 796 created penalties for every Labor Code violation and enabled the employee to share in any penalty awarded by the court. The court could also award attorneys' fees. Not surprisingly, this law resulted in a flurry of anti-employer lawsuits.

The amendment to SB 1809 does not repeal SB796 or the penalties it created, but it does empower courts to award lesser penalties to avoid unjust results. It also creates procedural steps that must be followed for three broad categories of alleged Labor Code violations before an employee lawsuit may be filed. (Labor Code sections 2699 and 2699.5)

The employee must now first notify the employer and the appropriate state agency of the alleged violation. The notice must include the specific code provisions alleged to have been violated, and the facts and arguments supporting the violation. All time limits run from the postmark date of this notice.



## WHAT DO YOU THINK?

We studied actual court cases from around the United States to develop the following examples. There are many perspectives to every complaint. Individual opinion of “reasonableness” dramatically changes with the introduction of additional facts. In an actual investigation, it would be necessary and appropriate to gather significantly more facts, witness testimony and perspectives before developing a conclusion. Give your answer to these examples and consider potential variations of the outcome.

An employee sues her employer alleging that her boss continuously harassed her for being late to work. He sent repeated emails, voice mail and reminded her daily of her attendance, threatening to fire her if she did not comply with the attendance policy of the company. Does she have a case?

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What if there is also a male coworker who is late, but only the woman receives reprimands with repeated emails, voice mails and threats?

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Is it sexual harassment for a supervisor to give a favorable employment benefit (bonus, raise or promotion) to an employee with whom the boss has romantic interests?

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What happens if the employee is not romantically interested in the supervisor but voluntarily submits to sexual advances in the hopes of getting a promotion or a raise?

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## WHAT DO YOU THINK?

Two married employees are having an affair. During lunch another employee sees them holding hands and kissing at a local restaurant. Is this harassment?

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What if the couple was seen holding hands on the company parking lot?

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Can an employee be found personally liable for sexual harassment damages?

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Can an employer be liable for Sexual Harassment committed by an employee against a Supervisor or Manager?

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## WHAT DO YOU THINK?

A coworker invites an employee to join a group of other employees who regularly go out to dinner after work. Is this a hostile work environment?

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A coworker invites an employee on a date, and the employee declines the invitation. Is that harassment?

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The coworker repeatedly invites the employee on a date, even after the original offer has been declined. Is this harassment?

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An employee puts pictures of nude models on the wall outside the office. Although nobody complains, should you do something?

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**What if the pictures are INSIDE the office?**

**What if they are in a desk drawer?**

**What if they are in a personal brief case or purse?**

**What if they are in a computer?**

## WHAT DO YOU THINK?

A male employee leaves a sexually explicit message for a female employee in the office with whom he has a romantic relationship. Then he receives an equally sexually explicit message from a different female in the office.

Does he have a claim for harassment?

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An employee graphically describes sexual experiences of a non-employee related partner to other employees. Is this Sexual Harassment?

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What if the conversation occurs off-site during lunch?

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An employee complains to a manager about Sexual Harassment, but asks not to investigate it.

*"I just wanted you to know. I don't want to get anyone in trouble. Don't do anything unless it gets worse,"* says the employee.

What would you do?

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## WHAT DO YOU THINK?

What if it is only one person's word against the other?

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Can a Company be liable for firing someone based on wrong determination resulting from a false claim of Sexual Harassment?

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**You can not retaliate against an employee or a witness for filing or assisting in the investigation of a Sexual Harassment complaint.**

If you have a performance issue with the employee (like attendance), and then the employee files a complaint for Sexual Harassment, can the employer still take action, including termination?

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Should a company announce the reason for termination of an employee as a result of Sexual Harassment?

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## WHAT DO YOU THINK?

What if a vendor Sexually Harasses an employee?

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During a job interview for a receptionist position at a roofing company, a female applicant was told that the position would require being exposed to coarse language on the job and lots of stress. The applicant was asked if she could 'handle it'. The applicant responded that she could and was hired for the position.

Thereafter, she was subjected to sexual comments, touching without permission, sexual jokes, nude calendars, rude gestures and innuendoes. She eventually left the job and filed a lawsuit claiming sexual harassment, retaliation, and constructive discharge. The roofing company claimed that the employee waived her right to file a complaint because she had been warned about the type of work environment she was entering.

What do you think?

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A receptionist at a Chicago securities firm was badgered by her boss for repeatedly wearing inappropriately provocative clothing. The plaintiff's boss criticized her for wearing suggestive short skirts, tight skirts and blouses, low-cut blouses, and other revealing clothes.

The boss allegedly told the plaintiff that her clothing left nothing to the imagination, and that he would not let his wife leave the house dressed like the receptionist did. She was reprimanded and ultimately terminated for unprofessional attire. She sued for sexual harassment.

What do you think?

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## WHAT DO YOU THINK?

A bartender at Harrah's Casino in Reno, Nevada brought a lawsuit alleging that her employer's policy requiring female employees to wear makeup discriminates against her on the basis of sex, since male bartenders were not required to wear the same makeup.

Does this constitute sex discrimination?

What do you think?

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Some female employees of a labor union alleged that a male supervisor, with little or no provocation, shouted at them, screamed at them, used foul language, invaded their personal space and used threatening physical gestures. The supervisor's behavior was not, on its face, sex related or gender related. Eventually, the employees resigned and filed an action for constructive discharge claiming that they were subjected to harassment based on sex.

No one testified that the male supervisor made sexual overtures or lewd comments, that he referred to women employees in gender-specific terms, or that he imposed gender-specific requirements upon women employees.

What do you think?

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## STOP HARASSMENT

### **When appropriate, confront the harasser and ask him or her to stop**

The harasser may not realize the advances or behavior are offensive. When it is appropriate and reasonable, you may tell the harasser that the behavior is unwelcome and must stop. Sometimes a simple communication is sufficient to resolve the situation. Step One – Ask the person to stop.

### **Report Sexual Harassment**

Contact your supervisor, human resource department or officers of the company designated to investigate harassment. Sexual harassment or retaliation should be reported promptly. You do not need to be the recipient of harassment to report it.

### **The Organization must Investigate and Take Action**

An investigation may damage a reputation or create retaliation. To avoid this, investigations must be discreet and considerate of the privacy of all parties involved. If evidence of improper conduct exists, take appropriate disciplinary action and document thoroughly.

### **Person to Person – Communicate Concerns**

Focus on the situation, issue, unwanted or inappropriate behavior. Do not make it personal or focus on the individual

Be specific about the behavior or environment (pictures, cartoons, etc) that is unwelcome or inappropriate

Tell the individual that it is unwelcome and ask them to stop the behavior or to remove the offensive material

Do it as soon as possible. Do not wait or dwell on your own emotional response

Encourage the other person's commitment to correct the situation and to not repeat the circumstances

If you are uncomfortable with direct confrontation of the situation, consult with your supervisor, human resource or company designated officer



## IN THE EVENT OF A COMPLAINT

### COMPLAINTS MUST BE DOCUMENTED

Even if the complaint is verbal from the employee, employers must document the complaint and the response completely. There is no "Off the Record"

Review the complaints with all parties in complete confidentiality

Investigate with open ended questions, allow each person to express 'their side of the story' for fair and impartial understanding. Do not use leading questions, multiple choice questions, True / False or Yes / No questions

Focus on the circumstances, not the individuals

### Take Immediate Action to Stop Harassment and make sure it does not recur

Disciplinary action should be proportional to the seriousness of the circumstances

The employer should correct effects of the harassment

### Possible Corrective Action

- No Action Necessary
- Counseling
- Verbal Warning
- Written Warning
- Improvement Plan
- Final Written Warning
- Suspension
- Termination

Schedule Closure Meetings with both the  
Alleged Target and the Alleged Source

## FOLLOW-UP

### Meet and Document with the **SOURCE** of the Harassment

- Date and type of complaint
- The specific and detailed results of the investigation, do not generalize
- The corrective action taken
- An explanation of consequences for retaliation or continued behavior
- An affirmation of complete confidentiality
- A detailed explanation of follow-up to ensure no retaliation
- The follow-up plan to assure that the behavior or circumstances have been corrected

### Meet and Document with the **TARGET** of the Harassment

- Date and type of complaint
  - The specific and detailed results of the investigation, do not generalize
  - The corrective action taken
  - An explanation of consequences for retaliation or continued behavior
  - An affirmation of complete confidentiality
  - A detailed explanation of follow-up to ensure no retaliation
  - The follow-up plan to assure that the behavior or circumstances have been corrected
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- Schedule a follow-up review meeting

## CREATE A POSITIVE ENVIRONMENT

**Acts or omissions that promote the perception of unfairness may damage morale or even be viewed as discrimination.**

- ✓ Apply rules equally to everyone.
- ✓ Do not make individual exceptions or “make examples” of anyone
- ✓ Act consistently with honest appraisals
- ✓ Assume that everyone wants personal advancement
- ✓ Avoid making decisions based on subjective ‘feelings’, use objective facts
- ✓ Explain rationale for decisions to employees, give clear instructions
- ✓ Make sure that channels for communication are open, “open door policy”
- ✓ Listen to all sides of the story, complaint or request
- ✓ Document and maintain complete records of employment decisions

### **Demonstrate Respect for all Persons**

- ✓ Be an Example to Others
- ✓ Be Professional and Courteous
- ✓ Use Common Sense
- ✓ Be Honest
- ✓ Act with Integrity
- ✓ Learn the Company Ethics Policy
- ✓ Avoid Conflicts of Interest, or the perception thereof
- ✓ If it “feels wrong” check it out, trust your instincts

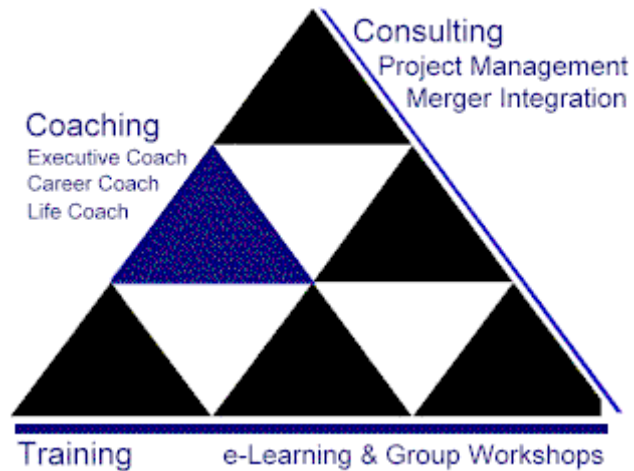
### **Make your Actions a Reflection of Your Words**

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