



## LAW UPDATE LABOR AND EMPLOYMENT

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### DFEH ISSUES WORKPLACE HARASSMENT GUIDE FOR EMPLOYERS

The California Department of Fair Employment and Housing (“DFEH”) is the state agency responsible for enforcing California’s anti-discrimination laws. These laws protect individuals from illegal discrimination and harassment in the workplace based on a variety of protected classifications, including race, religious creed, physical or mental disability, sex, gender, gender identity, gender expression, and sexual orientation. Harassment because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

The DFEH and the Fair Employment and Housing Council have been quite active in recent years. In May of 2016, the DFEH announced a new Task Force on the Prevention of Sexual Harassment in the Workplace. The Task Force is currently studying the problem of sexual harassment, the effects of California’s legal requirement for supervisors to receive sexual harassment prevention training, and best practices to prevent harassment.

In conjunction with the Task Force, the DFEH recently issued a new “Workplace Harassment Guide For California Employers.” The Workplace Harassment Guide is a nine-page document designed to assist employers with understanding their obligation to “take all reasonable steps necessary to prevent discrimination and harassment from occurring” in the workplace. (Cal. Gov. Code section 12940(k).)<sup>1</sup> The following is a summary of this guidance. We recommend all Superintendents, Human Resources and Personnel Administrators review the document in full at: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf>.

The Workplace Harassment Guide initially describes what it terms an effective anti-harassment program. According to the DFEH, each employer’s program should include a legally compliant “clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months).” Further, management employees should serve as role models for appropriate workplace behavior, understand the applicable policies, and receive legally compliant supervisory sexual harassment prevention training every two years. Employees who handle complaints should also receive specialized training. The program should include policies and procedures for responding to and investigating complaints, including assurance of prompt, thorough and fair investigations, and prompt and fair remedial action when required.

Schools Legal Service advises that any claim of alleged sexual harassment, retaliation, and even workplace abusive conduct/bullying, be addressed promptly, thoroughly, and fairly. The Workplace

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<sup>1</sup> Additionally, DFEH issued a revised brochure (DFEH-185, attached) and poster regarding California’s legal protections against sexual harassment and requirements for California employers to prevent and correct harassment.

Harassment Guide spends considerable time describing the hallmarks of a quality and legally defensible investigation regarding an allegation of wrongful behavior. Such an investigation will ensure due process for the involved parties, will be prompt, confidential to the extent possible, and conducted by a qualified investigator. The investigator should be an impartial, trained, and experienced internal or external individual who is able to make appropriate credibility determinations, reach well-reasoned factual conclusions based on the appropriate burden of proof standard, and accurately document the investigation.

The Workplace Harassment Guide also addresses several “special issues.” It is rarely advisable to agree not to take action even if the alleged target of harassment requests that the employer not do so. Further, a complaint should be investigated even when made anonymously. Lastly, complainants and those who participate in an investigation must be protected from retaliation. It is suggested that employers tell complainants and witnesses that retaliation is illegal and all parties should be counseled against it. The Workplace Harassment Guide lastly describes how to implement effective remedial measures, including training, verbal counseling, progressive discipline and termination, aimed at preventing and correcting unlawful behavior when there is proof of misconduct.

Schools Legal Service continues to provide regular, legally compliant supervisory sexual harassment prevention and response training and education. We also provide training upon request for non-supervisory employees regarding this important topic and training for management employees regarding investigation best practices and techniques. Upon request, Schools Legal Service serves as lead investigators regarding complaints of harassment, discrimination, or workplace bullying for our clients. We also routinely develop and monitor investigative plans to assist our clients in processing internal investigations.

Please feel free to contact us with any questions or concerns regarding this complex area of the law, to request trainings specific to your needs, or to inquire about assistance with a legally compliant investigation.

– Melissa H. Brown

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*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*



# SEXUAL HARASSMENT

SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

## BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

- 1 *Unwanted sexual advances*
- 2 *Offering employment benefits in exchange for sexual favors*
- 3 *Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters*
- 4 *Derogatory comments, epithets, slurs, or jokes*
- 5 *Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations*
- 6 *Physical touching or assault, as well as impeding or blocking movements*

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within one year of the last act of harassment or retaliation. 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 civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney's fees and costs if it prevails in litigation. 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.

THE MISSION OF THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING IS TO PROTECT THE PEOPLE OF CALIFORNIA FROM UNLAWFUL DISCRIMINATION IN EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATIONS, AND FROM THE PERPETRATION OF ACTS OF HATE VIOLENCE AND HUMAN TRAFFICKING.

### FOR MORE INFORMATION

Department of Fair Employment and Housing  
Toll Free: (800) 884-1684  
TTY: (800) 700-2320  
Online: [www.dfeh.ca.gov](http://www.dfeh.ca.gov)

Also find us on:



If you have a disability that prevents you from submitting a written pre-complaint form on-line, by mail, or email, the DFEH can assist you by scribing your pre-complaint by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice).

To schedule an appointment, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at [contact.center@dfeh.ca.gov](mailto:contact.center@dfeh.ca.gov).

*The DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.*

*Contact the DFEH at (800) 884-1684 (voice or via relay operator 711), TTY (800) 700-2320, or [contact.center@dfeh.ca.gov](mailto:contact.center@dfeh.ca.gov) to discuss your preferred format to access our materials or webpages.*

### THE FACTS

Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person's sexual orientation or gender identity.

### THERE ARE TWO TYPES OF SEXUAL HARASSMENT

- ① *"Quid pro quo"* (Latin for "this for that") sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.
- ② *"Hostile work environment"* sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with your work performance or create an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. That means that it alters the conditions of your employment and creates an abusive work environment. A single act of harassment may be sufficiently severe to be unlawful.

# CIVIL REMEDIES:



## ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

- 1 Damages for emotional distress from each employer or person in violation of the law
- 2 Hiring or reinstatement
- 3 Back pay or promotion
- 4 Changes in the policies or practices of the employer

## EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.

- ① Distribute copies of this brochure or an alternative writing that complies with Government Code 12950. This pamphlet may be duplicated in any quantity.
- ② Post a copy of the Department's employment poster entitled "California Law Prohibits Workplace Discrimination and Harassment."
- ③ Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. The policy must:
  - Be in writing.
  - List all protected groups under the FEHA.
  - Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in prohibited harassment.
  - Create a complaint process that ensures confidentiality to the extent possible; a timely response; an impartial and timely investigation by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.
  - Provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor. That complaint mechanism must include, but is not limited to including: provisions for direct communication, either orally or in writing, with a designated company representative; and/or a complaint hotline; and/or access to an ombudsperson; and/or identification of DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
  - Instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources

manager, so that the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).

- Indicate that when the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
  - Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.
- ④ Distribute its harassment, discrimination, and retaliation prevention policy by doing one or more of the following:
    - Printing the policy and providing a copy to employees with an acknowledgement form for employees to sign and return.
    - Sending the policy via email with an acknowledgment return form.
    - Posting the current version of the policy on a company intranet with a tracking system to ensure all employees have read and acknowledged receipt of the policy.
    - Discussing policies upon hire and/or during a new hire orientation session.
    - Using any other method that ensures employees received and understand the policy.
  - ⑤ If the employer's workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.
  - ⑥ In addition, employers who do business in California and employ 50 or more part-time or full-time employees must provide at least two hours of sexual harassment training every two years to each supervisory employee and to all new supervisory employees within six months of their assumption of a supervisory position.