

# Sexual Harassment Overview, 2018 Employment Law Updates, and Hot Topics for Non-Profits

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# Goals of Training

## Educate:

- The importance of compliance
- Recognizing and avoiding inappropriate conduct
- Legal requirements for employers concerning supervisory training and responding to complaints

## Prevent:

- Discrimination, harassment and potential liability.

## Answer:

- Questions about the law, inappropriate conduct and strategies for creating a respectful culture.

# Quiz

Unlawful harassment only includes sex-related conduct

True

False

Depends



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False

Depends



# Quiz

The law against discrimination or harassment applies outside of work hours and off company premises.

True

False

Depends



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# Quiz

Appreciative comments about a coworker's appearance constitute harassment.

True

False

Depends



# Quiz

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False

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# Harassment is Very Expensive

- Average California jury verdict: Over \$1.5 million
- Some verdicts have gone up to 170 million dollars for a single-plaintiff harassment case!
- Average cost of defense: Over \$350,000
- Plus, successful plaintiff's attorneys' fees paid by employer

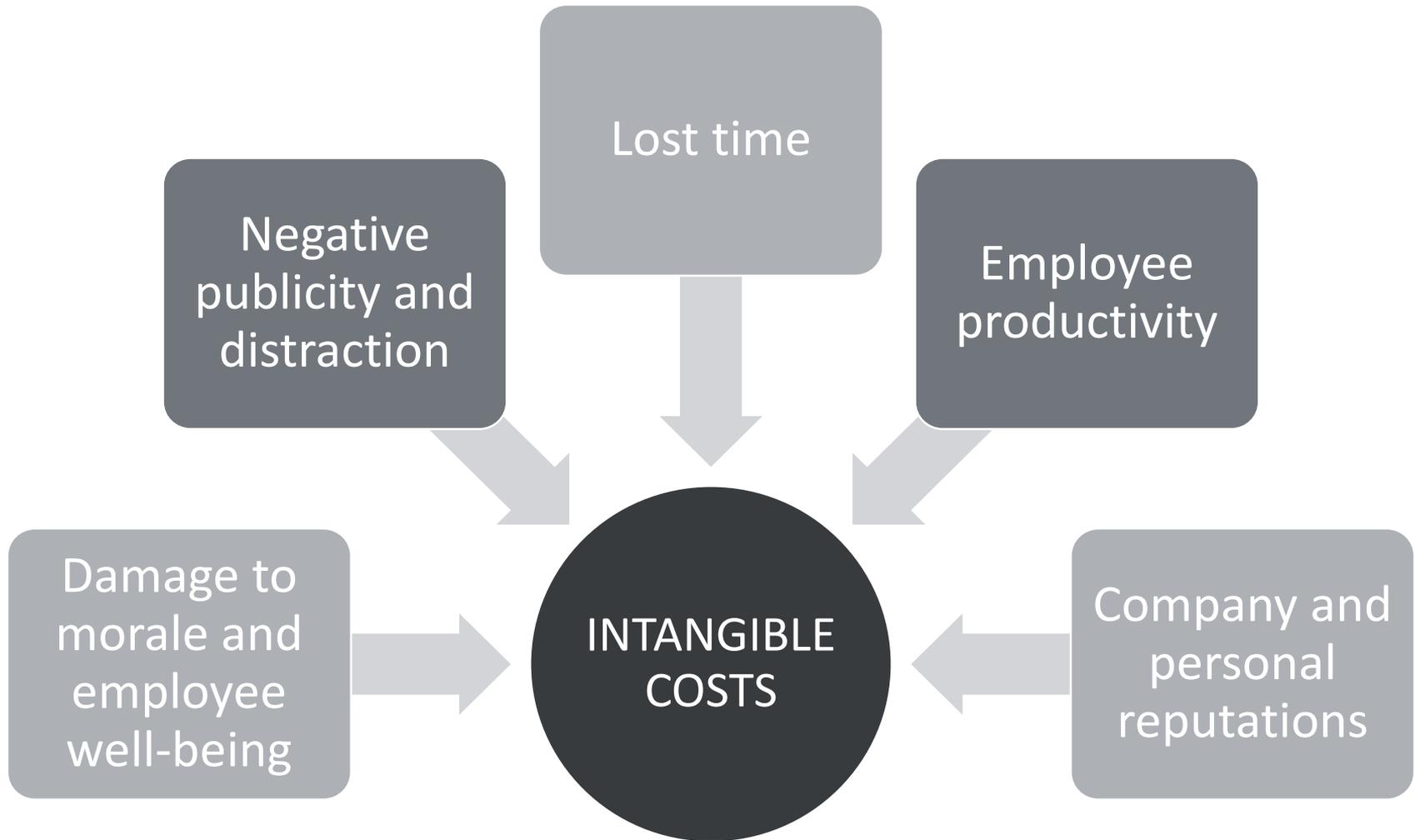


# Costs of a Sexual Harassment Claim



- NO DAMAGE CAPS UNDER CALIFORNIA LAW
- Damages for harassment can include back-pay, front-pay, and compensatory damages
- Punitive damages
- Attorneys' fees (required by statute to be awarded to a prevailing employee)
- Injunctive relief (i.e., requiring employer compliance, training)
- Interest (on "liquidated" or certain unpaid wages)
- Costs of suit
- Penalties
- Settlements

# Costs of a Claim



# Quiz

Companies and organizations can only be liable for harassment of employees by other employees.

True

False

Depends



# Quiz

Companies and organizations can only be liable for harassment of employees by other employees.

True

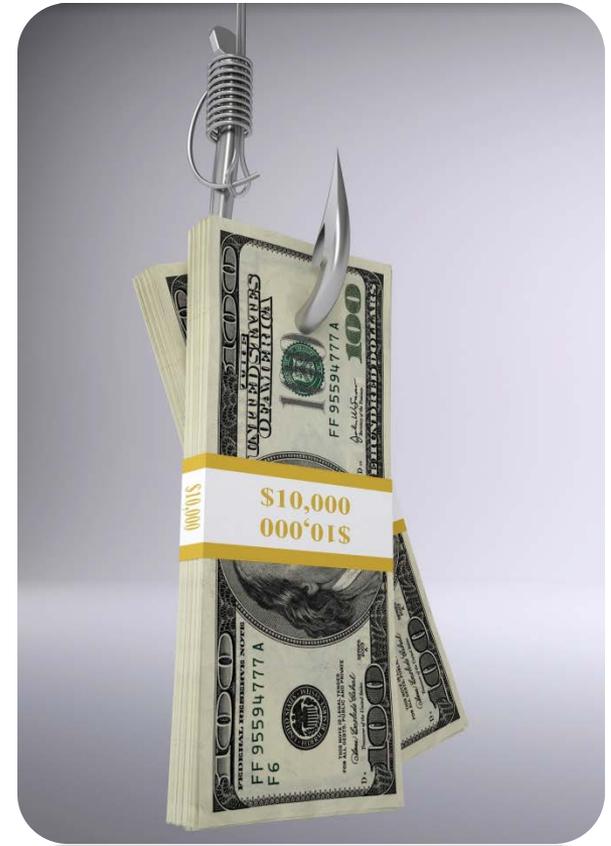
False

Depends



# Who Is Liable?

- The Business
- The Individual—YOU!
  - For harassment
  - For retaliation
  - For defamation
  - For intentional infliction of emotional distress
  - For assault and/or battery



# The Law: Discrimination and Harassment Prohibited

## FEDERAL LAWS

- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- Rehabilitation Act of 1973 and Americans with Disabilities Act (“ADA”)
- Pregnancy Discrimination Act of 1973 (“PDA”)
- Civil Rights Act of 1866
- Age Discrimination in Employment Act (“ADEA”)

## CALIFORNIA LAWS

- Fair Employment & Housing Act (“FEHA”)
- California Pregnancy Discrimination Laws
- Civil Code § 51.9

# The Law: Harassment Prohibited



State law prohibits harassment of an employee, applicant, unpaid intern or volunteer, or contractor based on: race, color, sex, religion, creed, national origin, ancestry, pregnancy, age, mental or physical disability, genetic information, military or veteran status, medical condition, marital or domestic partner status, gender, gender identity, gender expression, and sexual orientation.

# The Law: Harassment Prohibited

## Gender Related Definitions



- Sex – includes pregnancy, childbirth, breastfeeding, or medical conditions related to pregnancy
- Gender expression – a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth
- Gender identity – a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender
- Transgender – a person whose gender identity differs from the person’s sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth.

# The Law: Harassment Prohibited



- Prohibited conduct includes:
  - Physical harassment including assault, blocking or impeding movement and any physical interference with movement or with normal work when directed at an individual.
  - Verbal harassment including epithets, and derogatory comments or slurs.
  - Sexual favors, including unwanted sexual advances, which condition employment benefits upon exchange of sexual favors

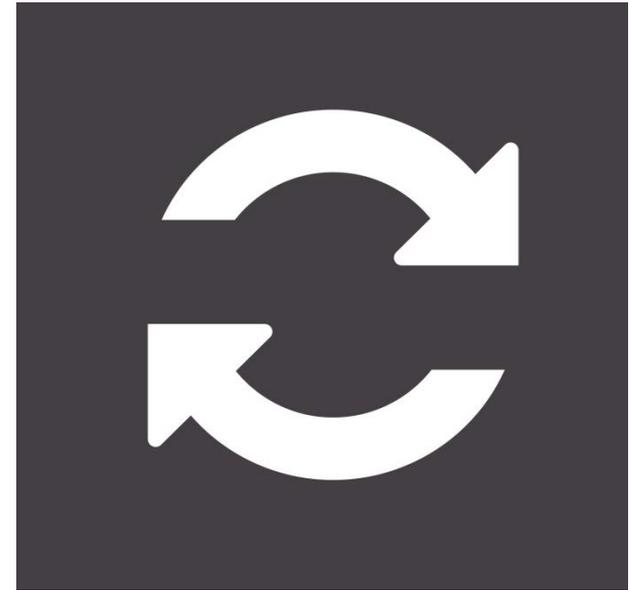
# The Law: Harassment Prohibited



- Prohibited Conduct (continued):
  - Visual forms of harassment including derogatory posters, emails, screen savers, cartoons or drawings;
  - Restrictions on the right to appear or dress consistent with “gender identity” subject to reasonable workplace appearance, grooming, and dress standards.

# “Quid Pro Quo” Harassment

- When one conditions a job, promotion, or other job benefit on another’s submission to sexual advances or other conduct based on sex

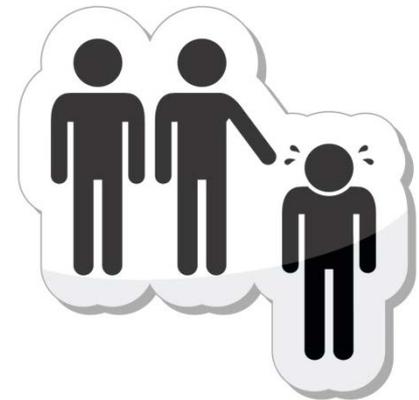


# Hostile Environment Harassment

The elements for a claim of hostile environment under FEHA are:

- (1) the plaintiff belongs to a protected group;
- (2) the plaintiff was subjected to unwelcome harassment because of being a member of that group; and
- (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

*See Aguilar v. Avis Rent A Car System, Inc.*,  
21 Cal.4th 121, 130, 87 Cal.Rptr.2d 132,  
980 P.2d 846 (1999).



# RISKY BUSINESS: RISKY OFFICE BEHAVIORS

- The Office Romeo
- The Shoulder Massager
- The Hostile Put-Downer
- The Elevator Eyes
- The Complimenter
- The Close Talker
- The Excessive Forwarder
- The Effusive Hugger



# What To Do When a Concern is Raised

- When an employee first approaches you with a complaint of alleged harassment, ***don't defend the alleged harasser and don't judge.***
- Listen to the complaint, explain the process, and let the employee know that all of his/her concerns will be investigated promptly and fairly, with no retaliation.
- Promptly report the incident according to DWT's process. Contact your supervisor or a member of Human Resources for guidance.
- Don't retaliate.



# What About Being Wrongfully Accused?

- Even if accusations are untrue or embarrassing, you should ensure they are independently investigated
- Everything you have said and done is subject to review



# Supervisor Training is Mandatory in California

Employers with 50 or more employees must provide at least ***two hours of interactive training*** regarding sexual harassment to all ***supervisory employees*** in California. Supervisors must attend training ***every two years***. *Cal. Gov't Code 12950.1.*

## Required components:

- “Information and practical guidance” on the laws concerning prohibition against and prevention and correction of sexual harassment;
- Remedies available to victims of sexual harassment;
- Practical examples;
- Coverage of prevention of “abusive conduct”

# Supervisor Training is Mandatory in California

The training “shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

*Cal. Gov't Code 12950.1 (a)*

# Required Components of the Training in California

Starting in 2015, employers were required to include a segment on prevention of “abusive conduct.”

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No minimum time, but must be covered “meaningfully”

↓

Discuss the elements of abusive conduct;

↓

Examples of abusive conduct;

↓

Explain that a single act is not usually sufficient;

↓

Negative effects on the workplace and on employers

# CA: 2016 DFEH Regulations

April 2016 regulations added new requirements for training, which include:

- Supervisors' legal obligation to report harassment, discrimination, and retaliation;
- Components of an investigation;
- Specific instructions for training on “abusive conduct”;
- Recordkeeping requirements.



# Required Components of the Training in California

- A definition of unlawful sexual harassment, other forms of harassment, and bases for harassment.
- Statutory provisions and case law concerning the prohibition against and the prevention of harassment, discrimination, and retaliation.
- The types of conduct that constitute sexual harassment.
- The remedies available, as well as potential employer and individual exposure/liability.
- Supervisors' obligation to report sexual harassment, discrimination, and retaliation when they become aware of it.
- Practical examples that illustrate sexual harassment, discrimination, and retaliation.
- Strategies to prevent harassment.

# Required Components of the Training in California

- The limited confidentiality of the complaint process.
- Strategies to prevent harassment in the workplace.
- Resources for victims of harassment, such as to whom they should report any alleged sexual harassment.
- *The* steps necessary to take appropriate remedial action, which include the obligation to investigate harassment complaints.
- What the supervisor should do if personally accused of harassment.
- Essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Provide each supervisor with a copy of the policy and require them to read and acknowledge receipt.
- A review of the definition of abusive conduct.

# Hypothetical: Request for Confidentiality

You are Eleanor's supervisor. She comes to you and confidentially reports that a coworker is bothering her in a sexually suggestive manner. You offer to investigate the matter. She firmly rejects the offer and states that she merely wanted you to be aware of the situation in case it became worse.



# Hypothetical: Request for Confidentiality

- A. Keep a close eye on the coworker and report the matter to senior management if Eleanor complains again or you independently observe inappropriate conduct.
- B. Report the matter immediately to senior management; however, protect Eleanor by characterizing the complaint as originating from “an employee.”
- C. Immediately fire Eleanor for noncompliance with the sexual harassment policy.
- D. Find a reason to immediately terminate the coworker.
- E. Tell Eleanor that as a supervisor you are obligated to report and follow up on certain matters.

# ANSWER: E

The employer is on notice through Eleanor's "confidential" report. To take no further action could subject the company and her supervisor to liability. Also addressing the problem at the earliest possible stage is the best way to find a solution. Finally, explain to Eleanor that the coworker may be bothering other employees even if he subsequently leaves her alone. Doing nothing could be as bad as answers C and D.

# Non-Profits are not Immune to Sexual Harassment Claims



# Updates on California Employment Law (2018)

- Ban on seeking job applicant's compensation history
- Ban the Box – Job Applicants' Conviction history
- Expansion of 12 week parents leave to Employers with 20 or more employees
- Immigrant Worker Protection Act
- Reminder of Increase in Minimum Wage and Minimum Salary basis
- Recognition of Nonbinary Gender on State Id Documents

# Hot Topics for Non-Profits: Volunteers

- Intent of the parties is controlling.
  - A regular employee may “donate services” to a non-profit employer – but only in certain circumstances.
  - Can’t use volunteers:
    - When a non-profit organization operates a commercial enterprise which serves the general public
- OR
- When a non-profit contracts to provide personal services to business.

# Hot Topics for Non-Profits: Interns and Trainees

- Be careful when classifying individuals as interns or trainees. Most “interns” will be considered employees under state and federal laws.
- California has changed the way it evaluates interns and trainees as apart from employees.
- In 2010, the DLSE adopted the then-current DOL 6-factor criteria for evaluating interns and trainees.
- The DOL updated its test used to evaluate whether someone is an intern or employee – and changed the historic 6-factor test to a 7-factor “primary beneficiary” test.

# Hot Topics for Non-Profits: DOL's New 7-Factor Test

- 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

ANY  
QUESTIONS?

