Harassment Prevention Training

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Why Am I Here?
Seriously, Why Am I Here?

- Employers with more than 50 employees are required to provide at least two hours of harassment prevention training to all managers and supervisors
  
  \[\text{Gov. Code} \ § 12950.1\]

- Employers are required to take all reasonable steps to prevent harassment from occurring, such as having a harassment policy, and training employees on sexual harassment
  
  \[\text{Gov. Code} \ § 12940(k)\]

Isn’t This Just For Employees?

- AB 1661 was signed by Governor Brown on September 29, 2016 and Effective January 1, 2017

- Mandates harassment prevention training for any local agency official who receives any compensation, salary or stipend

- Two-hour long training within 6 months of taking office and every 2 years after
There Are Other Important Benefits

- Risk Management
- Complying with Legal Duty to Prevent Harassment
- Doctrine of Avoidable Consequences
- Limitation on Damages
- Increase Employee Retention and Organizational Productivity

What are the Relevant Harassment Laws?
Relevant Workplace Laws

• Federal Laws
  – Title VII of the Civil Rights Act of 1964
  – Americans with Disabilities Act ("ADA")
  – Age Discrimination in Employment Act ("ADEA")
  – Genetic Information Non-Discrimination Act ("GINA")
  – Administered by the Equal Employment Opportunity Commission ("EEOC")
    [www.eeoc.gov]

• California Law
  – Fair Employment and Housing Act ("FEHA")
  – Administered by the Department of Fair Employment and Housing ("DFEH")
    [www.dfeh.ca.gov]

To Whom Does the Law Apply?

• The Law Protects:
  – Employees
  – Unpaid Interns and Volunteers
  – Applicants

• The Law Prohibits Harassment From:
  – Employees (of any rank)
  – Third Parties, such as:
    • Elected and appointed officials
    • Vendors
    • Visitors
    • Members of the public
What is Workplace Harassment?

What is Harassment?

ha·rass [huh-ras, har-uh s]  
—verb (used with object)  
1. to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute.  
2. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid.  
—Synonyms  
1. badger, vex, plague, hector, torture.  
2. molest.  

Dictionary.com
How is Harassment Under the Law and City Policy Different?

**BECAUSE OF LEGALLY PROTECTED CHARACTERISTICS**

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<td>Age Over 40</td>
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FEHA Protects...

- A person who is a member of one or more of the protected categories;
- A person who is perceived to be a member of one or more of the protected categories; and
- A person who is associated with a person who is in, or is perceived to be in one or more of the protected categories.
What is Sexual Harassment?

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
What is Sexual Harassment?

Motivation for Conduct

Sexually harassing conduct need not be motivated by sexual desire.

The City and individual employees are at risk for liability when the conduct is simply sexual in nature.

Quid Pro Quo Sexual Harassment

Offering employment benefits or giving preferential treatment in exchange for sexual favors;

and/or

Retaliating against or getting back at someone who turns down sexual advances.
Hostile Work Environment Harassment

Hostile work environment (HWE) harassment occurs when offensive conduct that is based on a protected characteristic is severe or pervasive enough to alter the conditions of an employee’s job and create an abusive working environment.

Examples of HWE

Verbal Conduct

- Derogatory comments about a protected characteristic
- Sexual, racist or similar jokes
- Talking about sexual conquests, preferences, experiences and values
- Spreading rumors or gossip about a person’s personal or sex life
- Verbal abuse
Examples of HWE

Visual Conduct
- Posters
- Calendars
- Pictures
- Screensavers
- Electronic images

Examples of HWE

Sexual Advances and Propositions
- Repeatedly asking someone on a date
- Romantic relationships
- Former romantic relationships
Examples of HWE

- Physical conduct
  - Hugging, kissing, pinching, massaging, rubbing
  - Brushing up against someone
  - Leering at someone or “checking them out”
  - Interfering with movement
  - Invading someone’s space
  - Staring at a person

- Correspondence
  - Email, text messages, instant messages, handwritten communications, blogging, social networking, social media
  - Disclosure of electronic communications
    - Internal Investigations
    - Litigation
    - California Public Records Act
Public Records Act – City of San Jose

• Emails and text messages by public officials are subject to the CPRA regardless of location, including personal accounts and devices.

• Primarily focus is whether the message is related to public business, based upon context, content, purpose, audience, and role of individual when message was written or received.

Public Records Act – City of San Jose

• You, as an official or an employee, may now be required to:
  – search your private emails or personal phones for responsive records if you use your private email account or personal phone to communicate with others concerning public business; and
  – Certify or provide a factual basis as to whether responsive records exist and/or withheld.
Public Records Act – *City of San Jose*

- Claiming that the records are not on entity email accounts, computers or servers is NOT enough for compliance now.
- Elected officials should not use personal devices to discuss City business or store documents or emails.
- No prohibition against discovery in litigation of contents on either City-issued or personally owned electronic devices.

What if the Behavior Is Not Motivated by a Protected Characteristic?
It Might Be “Abusive Conduct”

• If conduct is not motivated by a protected characteristic, it could qualify as “abusive conduct.”
• Abusive conduct is different
  – Not motivated by a protected characteristic
  – Harassment is prohibited by law
• Since 2015, employers are required to discuss the prevention of abusive conduct during supervisory harassment prevention training

So, What is Abusive Conduct?

• 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 physical conduct that a reasonable person would find threatening, intimidating, or humiliating;
  – The gratuitous sabotage or undermining of a person’s work performance
• A single act shall not constitute abusive conduct, unless especially severe and egregious
### Examples of Workplace Bullying

- Hostile Glares
- Malicious “Teasing”
- Withholding Information
- Spreading Malicious Rumors
- Creating Undue Pressure
- Insults And Put-Downs
- Intimidation
- Demeaning Work Abilities
- Not Giving Credit
- Setting Employee Up for Failure
- Constant Reminding of Old Mistakes
- Silent Treatment
- Personal Attacks
- Undermining Employees
- Aggressive Behavior
- Unwarranted Criticism
- Overworking Employees
- Isolating Employees
- Giving Impossible Deadlines
- Threats
- Yelling
- Exclusion

### How to Address Abusive Conduct

**Internal Reporting**

- The rest of the obligations under the FEHA that are discussed in this training do not apply to abusive conduct.
- Any employee who believes that he/she is being subjected to abusive conduct should report that to a supervisor, HR, or to the City Manager.
- Any official or supervisor who is aware of potential abusive conduct in the workplace should report that to the City Manager.
How Does One Establish That Harassment Exists?

Harassment in Litigation

- Subjective Standard:
  - A hostile work environment must be subjectively perceived as abusive to alter the conditions of the plaintiff’s employment.

- Factors to Consider:
  - Was the conduct unwelcome?
  - Did the employee complain about the conduct?
  - Did the employee suffer psychological harm?
  - Did the employee participate in the conduct, i.e., engage in “horseplay” with the offender?
Harassment in Litigation

• **Objective Standard:**
  – Was the plaintiff’s subjective belief reasonable?
• **Factors to Consider:**
  – Frequency and severity of the conduct
  – Threatening or humiliating vs. a minor offensive utterance
  – Did it unreasonably interfere with an employee’s work performance?
  – Psychological harm

Harassment in Discipline

**Disciplinary Action**

• **Did the employee violate City policy?**
• **Is the City required to act to prevent unlawful harassment?**
• **An employee can be disciplined for conduct that does not meet the legal/litigation standard**
Discrimination and Retaliation

Employees have a right to the opportunity to seek, obtain, and hold employment without discrimination.

An employer may not discriminate against any job applicant or employee in hiring, promotions, assignments, termination, or any term, condition, or privilege of employment based on a person’s actual or perceived protected characteristic(s).

Individual employees are not liable for discrimination, only the City.

What is Discrimination?
**What is Retaliation?**

**Adverse Action**
- Termination
- Demotion
- Failure to promote
- Refusal to hire
- Poor evaluation
- Unwarranted criticism or ostracism
- Denial of privileges, such as overtime

**Protected Activity**
- Filing a good faith complaint
- Testify, assist or participate in proceedings or hearings
- Opposing an act the employee reasonably believes is unlawful
- Defending yourself against a charge
- Reasonably refusing to follow a discriminatory order (if City is aware of belief)

**Relation to Harassment and Discrimination**

An employee can establish retaliation even where the employee cannot establish the underlying harassment or discrimination occurred.
Establishing “Taken Because Of”

- **Direct Evidence:**
  - Statements By The Supervisor Taking Discipline
    - Caution: City Still Liable If Supervisor Not Aware of Protected Activity but Relied Upon A Subordinate Manager

- **Circumstantial Evidence:**
  - City’s Knowledge Of Protected Activity
  - Proximity of Time Between Protected Activity and Adverse Employment Action

Defense to Retaliation

- **Action was justified by a legitimate, non-retaliatory reason**
  - Employee can defeat by showing the stated reason was a pretext
    - Reason was false or unpersuasive
    - Similarly situated employees were treated differently

- **Effective documentation is key to defense**
  - Documentation should be consistent
  - Documentation should be fair and unbiased
## Creating Effective Documentation

### Sufficient Factual Information & Context

- Will the employee know what you are talking about?
- Would the comments make sense to an outside person?  
  – Such as a judge or jury?
- Will you remember what you meant years in the future?

## Creating Effective Documentation

- Created Contemporaneously with the Event
- Believable
- Accurate
- Factual/Objective
- Unbiased
- Professional
- Professional Tone
- Proofread

- Spell Check
- Complete Sentences
- Grammar/Logic
- Date
- Author (printed)
- Identify, Quote, and Attach Rules/Policies
- Provide Context
- Outline
- Consequences
What Do I Do if I am the Accused?

How Can I Be Accused?

- Three ways:
  - Internal complaint
  - Charge filed with the EEOC/DFEH
  - Named in Litigation
- City must investigate upon first receipt of complaint or knowledge
What Should I Do If I am Accused?

- Fully participate in the investigation
  - Be patient
  - Be cooperative
  - Be honest
  - Do not retaliate

- Notify City Attorney's Office upon receipt of any EEOC/DFEH charge or litigation

What Do I Do if I Think I am the Victim?
Complaint Procedures

- Employees should report harassment to the City Manager, HR, or to any City Supervisor.
- Complaints should be made as soon as possible after the alleged incident(s).
- Complaints should be as specific and detailed as possible.
  - Written or verbal is acceptable.
- Potential adverse consequences in litigation if the employee does not follow internal procedures.

What Happens After A Complaint is Filed?
Investigation of Complaints

- The City will conduct (or oversee) a prompt and impartial investigation of all complaints
- The City will take steps to protect employees from retaliation
- The City will take steps to protect confidentiality to the extent practical
- The City will take appropriate corrective action

Legal Consequences of Harassment
City Liability for Harassment

- **Supervisors:**
  - City is vicariously liable
- **Non-Supervisory Employees or Third Parties:**
  - If City knows or has reason to know that the sexual harassing conduct occurred

Supervisor's Obligation

- Any supervisory employee who receives a complaint OR who has reason to believe that harassment, discrimination, or retaliation may have occurred MUST notify the City Manager immediately
- This obligation is not dependent on
  - The supervisor being the supervisor of the complaining party or alleged target of harassment
  - The supervisor directly learning of it from the complaining party of alleged target of harassment
Individual & City Liability for Harassment

• Compensatory Damages
  – Emotional Distress
  – Lost Wages
    • Backpay
    • Future Earnings

• Punitive Damages
  – Unlimited under FEHA if the defendant is shown by clear and convincing evidence to have acted with oppression, fraud or malice
  – Limited under Title VII if the defendant acted with malice or reckless indifference

• Attorney’s Fees
  – Defendant’s Fees
  – Plaintiff’s Fees

Officials Liability for Harassment

• If a plaintiff successfully proves harassment (or other intentional torts) by an elected official, the elected official can be personally liable for the judgment.
• The plaintiff must recover against the official first.
• The remainder can be recovered against the City, but the City can sue the official for reimbursement.
• The plaintiff must then prove that the alleged intentional tort “arose from and was directly related to the elected official’s performance of his or her official duties” in order to directly recover from the City.
• Harassment is NEVER directly related to your duties as an elected official!
The Intangible Costs

• Damage to the City’s reputation
• Damage to the Official’s reputation
• Unfavorable media coverage and scrutiny
• Attrition
• Decreased productivity
• Distraction and disruption
• Polarization as a governing body and as an City

Group Participation!
Group Participation!

What happens if an employee is sexually harassed by another employee at a non-City event?

A. Nothing because the City cannot do anything if the harassment occurred away from the workplace.

B. The employee should report it to a supervisor, Human Resources, or the City Manager.

Group Participation!

What happens if there are no witnesses to claimed sexual harassment?

A. The City still has to investigate, so the Employee should make a complaint.

B. The Employee should just try to handle it by himself/herself because no one will believe the story without witnesses.
Group Participation!

An employee is telling offensive sex jokes at work. Does the employee need to tell him or her that they are offended?

A. Absolutely. How will they know if the employee doesn’t speak up?
B. Only if the employee wants to do so and feels comfortable having that conversation.

Group Participation!

I’m Facebook friends with 3 co-workers and 2 subordinates. One of my co-workers just complained at work about some comments I posted on my wall. Is it okay for the City to be investigating me for this?

A. Absolutely not. Anything you say on Facebook is protected by the First Amendment.
B. It depends on the comments.
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