


Sexual Harassment Prevention Training


League of California Cities New Mayors & Council Members Academy | January 30, 2019

Presented by: *Laura Drottz Kalty*



**Sexual Harassment
Prevention Training**

League of California Cities
New Mayors and Council Members Academy
January 30, 2019

 INSTITUTE FOR
LOCAL GOVERNMENT



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ILG's Mission



- Promoting good government at the local level
- Practical, impartial and easy-to-use materials

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Agenda

- Overview of laws and policies related to discrimination, harassment, and retaliation
- Protected classifications and bullying/abusive conduct in the workplace
- What is discrimination, harassment, and retaliation?
- Types of harassment
- Duties of a supervisor
- Addressing discrimination, harassment, and retaliation in the workplace

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Harassment Unfortunately Still Takes Place....



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Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation

Sources of Law

- **Federal law**
 - Equal Pay Act of 1963
 - Title VII of the 1964 Civil Rights Act
 - Age Discrimination in Employment Act (ADEA)
 - Americans with Disabilities Act (ADA)
 - 42 U.S.C. §§ 1981 and 1983
- **California law**
 - Fair Employment and Housing Act (FEHA)
 - California Equal Pay Act

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Administrative Agencies

- **U.S. Equal Employment Opportunity Commission (EEOC)**
 - Federal agency administering Title VII, ADA, and ADEA employment discrimination laws
- **California Department of Fair Employment and Housing (DFEH)**
 - State agency administering FEHA employment discrimination laws

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Agency Policy

- The Agency's policy against harassment, discrimination and retaliation
 - Prohibits employees and non-employees from discriminating, harassing and retaliating based on any protected status
 - Protect applicants, volunteers, independent contractors and employees from being subject to prohibited conduct
 - Provides a complaint procedure for employees to report violations for the agency to investigate
 - Identifies DFEH/EEOC resources
 - Provides confidentiality to extent possible
 - Appropriate remedies for sustained violations

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Agency Policy

- Zero tolerance
 - Single violation of agency's policy can subject employee to appropriate disciplinary action even if violation would not establish liability or be a violation of state/federal law

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Protected Classifications and Bullying/Abusive Conduct

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Protected Classifications

- Sex/gender/gender identity/gender expression
- Sexual orientation
- Race/national origin/color
- Disability/medical condition
- Genetic information/characteristics
- Religious creed
- Marital status
- Military/veteran status
- Age (40 years of age and older)
- Opposition to discrimination/harassment
- Association/perception

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Gender Identity / Expression

Employers **must**:

- Permit employees to use the restroom that corresponds to the employee's gender identity/expression.
- Refer to employees using the employee's preferred name, gender, and pronouns

Employers **must not**:

- Enforce dress codes more harshly against an employee based on their gender identity/expression.
- Discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant's sex assigned at birth.
- Inquire about or require documentation or proof of an individual's sex or gender.

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Bullying/Abusive Conduct?

What about bullying and abusive conduct in the workplace?



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Bullying/Abusive Conduct is Improper in the Workplace

- “Bullying/abusive conduct”
 - Conduct in the workplace with malice that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests
 - Includes verbal abuse, derogatory remarks/insults, threatening/intimidating/humiliating physical or verbal conduct, or undermining of a person’s work performance
- Bullying/abusive conduct issues are generally covered by the agency’s standards of conduct rules and such rules should be enforced

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Bullying v. Harassment

- Both harassment and bullying consist of offensive conduct that is either pervasive or severe, and thus goes beyond mere incivility...

So, what's the difference?.....

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Bullying v. Harassment

**Protected
Classification**

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Difference Between Harassment and Bullying

- Harassment is directed at membership in a protected classification
 - Therefore, it is unlawful
- Bullying is **NOT** necessarily directed at membership in a protected classification
 - Therefore, bullying is **NOT** unlawful
- **While not necessarily unlawful, bullying/abusive conduct towards employees in the workplace is entirely inappropriate and should not be tolerated**



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What is Discrimination, Harassment, and Retaliation?

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Discrimination

Elements of discrimination

- An adverse employment action taken based on a protected category status

Adverse employment action =

- Action taken within the course and scope of employment
 - Hiring, firing, demotion, failure to promote, assignment of job duties, etc.

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Harassment

- Harassment is **NOT** within the course and scope of employment
- Verbal, visual, or physical actions that are unwelcome and directed to or related to an employee's protected classification
- Includes actions by/towards employees, independent contractors, vendors, and other non-employees

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Retaliation

Elements of retaliation

- Protected activity – broad standard
 - Reporting discrimination or harassment
 - Participating in an investigation
 - Refusing to follow order reasonably believed to be discriminatory
- Adverse action – broad standard
- Causal connection

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What If You Are Accused?

- Refer the accuser to a superior, human resources, or upper management
- Report the accusation to your supervisor and to human resources
- Refrain from **ANY** action that could be interpreted as retaliation
- Seek constructive counseling from human resources/upper management
- Cooperate in the investigation
- Follow the agency's policy

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Types of Harassment

Two Types of Harassment

1. **Quid pro quo**
("Economic")



2. **Hostile work environment**
("Environmental")



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Quid Pro Quo Sexual Harassment ("Economic" Harassment)



Classic example:

*"Sleep with me
and I'll ..."*

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Quid Pro Quo Sexual Harassment ("Economic" Harassment)

Elements of "economic" harassment:

- Job benefits promised;
- Explicitly or implicitly;
- In exchange for:
 - Sexual favors; or
 - Denied if sexual favors are not given

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Case Study

Jane is a member of the City Council. She invites Ed, the City Manager, to lunch to discuss his request to increase his monthly car allowance in his employment contract with the City.

Did Jane engage in quid pro quo sexual harassment?

What facts might change your answer?

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Hostile Work Environment ("Environmental" Harassment)

Elements of "environmental" harassment:

- Protected classification
- Physical, verbal, or visual conduct
- Objectively and subjectively offensive (unwelcome)
- Severe **or** pervasive
 - Single incident may establish liability under FEHA
- Unreasonably interferes with work

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Hostile Work Environment ("Environmental" Harassment)

2019 changes to California law:

- Decline in productivity not required to establish harassment – it is sufficient that the conduct “so *altered working conditions as to make it more difficult to do the job.*”
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including “stray remarks” by non-decisionmakers
- Standards do not vary by workplace
- Rarely determinable “on paper” alone

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Physical Conduct

Obvious examples:

- Rape
- Sexual assault
- Touching/groping



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Physical Conduct

Less obvious:

- Massage
- Hugs
- Physical intimidation



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Case Study

Manuel and Regina are on the City Council. During Council meetings, Regina rubs Manuel's shoulders because she's a massage therapist, and she and Manuel have been friends for a long time.

Have Manuel and Regina created a hostile work environment for the rest of the Council?

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Verbal Conduct

- Sexual comments
- Jokes
- Mocking accent
- Teasing
- Slurs



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Case Study

Councilmember Ortiz (who was born in Mexico), has on several occasions referred to City Manager Jane Smith (who is Caucasian), as “white girl.” Jane laughs at these comments, though she is actually offended by them.

Has Councilmember Ortiz created a hostile work environment?

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Visual Conduct

Posters
Calendars
Magazines

Emails

Racial or religious cartoons

Gestures

Staring/leering

Sexual conduct/affection between other employees at work

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“Gray” (Borderline) Areas

- “Private” and “consensual” relationships between supervisors and subordinates? (**Warning:** not for long!)
- Off-duty conduct
- Invitations to lunch, drinks or dinner
- References to appearance or dress
- “Casual” touching of non-intimate parts of the body

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Duties of a Supervisor

Who is a “Supervisor”?

- Anyone who has any responsibility or discretion to lead others.

Government Code section 12926(t)

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Supervisor's Duty to Respond

- *“Harassment... shall be unlawful if the entity, or its agents or supervisors, **knows or should have known of this conduct** and fails to take immediate and appropriate corrective action.”*

Government Code section 12940(j)(1)

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Supervisor's Duty to Respond

- Report observed/overheard conduct
- Forward complaints/issues to management and human resources promptly, including:
 - Third-party complaints
 - Verbal complaints
 - Rumors

Remember:

The word “*harassment*” need not be used to trigger your duty to act

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Supervisor's Duty to Respond

Don't ignore the response!

- Take immediate action and report/ follow-up on any harassment, discrimination, or retaliation complaints received
- Cooperate in the investigation
- Prevent further harassment
- Assure no retaliation



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Addressing Discrimination, Harassment, and Retaliation in the Workplace

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Duty to Investigate

- Under federal and state law:
 - Affirmative obligation to promptly and investigate harassment complaints
 - Take corrective action to prevent future occurrences
 - Impose appropriate discipline

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Duty to Investigate

- California Fair Employment and Housing Act (FEHA):
 - “It is an unlawful employment practice ... for an employer...to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”*
 - Cal. Gov. Code § 12940(jk)

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Duty to Investigate

- FEHA:

“Harassment of an employee...shall be unlawful if the [employer] or, its agents or supervisors, know or should have known of this conduct and fails to take immediate and appropriate corrective action.”

--Cal. Gov. Code § 12940(j)(1).

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What Do You Do About:

- Anonymous complaints or rumors
- Reluctant complainants
- Complaints against high-level employees or members of agency's governing body
- Conduct that has been observed but no complaint has been made

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Appropriate Corrective Action

- Conduct prompt and thorough investigation
- Keep the victim informed
- Discipline perpetrator appropriately
- Preventative training to prevent future violations
- Re-publish/update agency policy

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Options for Resolution

- Follow the agency's harassment policy complaint procedure
- The alleged victim can also take the following actions:
 - Report to the U.S. Equal Employment Opportunity Commission (EEOC)
 - Report to the California Department of Fair Employment & Housing (DFEH)
 - Lawsuits in state or federal court

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Consequences – Damages & Liability

- The agency is liable for the conduct of **supervisors** who engage in unlawful harassment, discrimination, or retaliation
- All employees can be individually and personally liable for engaging in unlawful harassment
- Damages can include:
 - Back pay
 - Emotional distress
 - Punitive damages (individual employees)

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The Ultimate Goal is to
Establish a Workplace
Defined By Courtesy,
Sensitivity, and Respect

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Thank You!

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