

Ending the Silence

Workplace Harassment Prevention Training
Fosters an Environment of Respect and Trust

By Jennie Orvino

There is a greater awareness of sexual harassment these days since Hollywood stars and movie moguls were brought to justice by the #MeToo movement. And after the Black Lives Matter protests exploded across the nation following the murder of George Floyd, the topics of abuse and discrimination continue to be top-of-mind. Even the pandemic found space within it to birth a new wave of anti-Asian prejudice and hate crimes.



Law AB 1825

The State of California, seemingly ahead of the civil rights curve, has taken sexual harassment, as well as other varieties of harassment and discrimination very seriously and now seeks to protect its citizens from harm, at least in the workplace, through the force of law.

AB 1825, signed in 2005 by Gov. Schwarzenegger, requires that employers with 50 or more employees provide supervisory personnel with two hours of harassment prevention training within six months of being hired, and every two years thereafter. In 2018, California's SB 1343 extended the training to employers with five or more employees. These trainings, which must be "in an effective and interactive format," have a two-hour requirement for supervisory and a one-hour requirement for non-supervisory personnel. The training format is "designed to educate, or remind, everyone about what is and what is not acceptable behavior in



Tracy Emmerich, Leap Solutions Group

becomes uncharacteristically withdrawn, the supervisor needs to check in. Additionally, those in leadership positions must be clear about their responsibility when someone reports harassment, or they witness it themselves.

Most people are surprised to learn that not all harassing behavior is unlawful. The activity must be unwelcome, offensive conduct upon—or related to—a characteristic of a protected category. It becomes unlawful when it becomes a condition of employment, or is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. "Bullying or abusive behavior goes against the policies of any company I've ever been involved with," Emmerich says, "and those in charge must take corrective action for it. While not all harassing behavior meets the standard of unlawful conduct, any workplace harassment is inappropriate and should not be tolerated."

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the workplace," as outlined in the California Department of Fair Employment and Housing FAQs.

Harassment prevention training

Tracy Emmerich, a certified senior professional in human resources with 30 years' experience in the field, conducts harassment prevention trainings for clients of Leap Solutions Group, a prominent Santa Rosa-based team of organizational development, human resources, executive search, and recruitment professionals. Emmerich says unchecked harassment can lead to interpersonal conflict, decreased productivity, increased turnover, possible legal costs, and potentially irreparable harm to a company's reputation.

Although training can be conducted via Zoom, Emmerich prefers in-person groups to encourage participants to pay closer attention, and to share camaraderie in the room. "We all hear each other and learn from each other," she says. "We go through scenarios. We ask true or false questions. Participants can ask real-life questions. Everyone has to participate and consider: how does this apply, do we have enough information to say this is harassment or not, and what is my responsibility as a co-worker or a supervisor?"

The concept she stresses with the supervisors is to lead by example. Leaders must be aware of the work environment and what's going on. Just because no one is complaining doesn't mean harassment isn't happening. If someone has always been a good performer and starts calling in sick all the time, or if the worker

There are several steps for an individual to take if he or she is experiencing harassment. The first, and hopefully the easiest, is for the employee to tell the offending person that their behavior is inappropriate, unprofessional or is bothering them. Often when someone is made aware that their conduct has breached a boundary, they stop and apologize. "In the training, I'll give an instance when a person describes an incident to their boss and says, 'This is happening, but I don't want you to do anything.' They fear repercussions or retaliation," says Emmerich. "The supervisor must be honest and say, 'I will keep it as confidential as I possibly can and present only on a need-to-know basis, but as a supervisor, I must report it to the appropriate person (human resources, legal counsel) because the company has a legal obligation to stop the harassing behavior.'"

Often the supervisor is too close to the situation, or not qualified to investigate a complaint. Or, in some instances, may even be the harasser. The next step is to go to HR, or, for smaller companies without a human resources department go to the CEO, the board of directors, or an outside agency. Emmerich believes the company is usually in the best position to make the harassment stop, but if the top person in authority can't or won't help, then the complainant should go to an outside agency.

How forthcoming about harassment a person is may be a result of the company culture, says Emmerich. For example, when she begins training, she asks employees whether swearing is acceptable in that workplace. "Some people raise their hands; some people

don't," she says. The question is about company culture. Are people okay with that type of behavior, or stay silent because they want to fit in? We examine the company culture and talk about how they can hold each other accountable."

Emmerich describes a case she was involved in. "It was between a male manager and female supervisor; he was her manager. The female complained that her boss was harassing her by not listening to her, by going around her, by leaving her out of important situations. We did an investigation, listened to both sides, and concluded that there wasn't any harassment. In this case it was determined that the behavior was not severe, not persistent, not based on a protected class. These two had a difference in communication styles, says Emmerich, and an outside consultant was brought in to help them understand and use their communication styles to better understand each other.

"It was so incredible to watch the light bulbs go on in their heads when they realized that because of a difference in styles, the other person was not hearing things as they intended," she says. "A lot of people will jump to the conclusion that it is a hostile work environment when it's really a personality clash or miscommunication. This was one of my most successful cases."

There was another situation where an employee claimed harassment, but after an investigation, it was determined that the supervisor had just been holding the employee accountable. The key to a resolution is circling back to the employee to make sure he or she understands the difference. "The goal is to stop bad behavior, whether or not it meets the definition of unlawful harassment," says Emmerich. "Employers must take steps to prevent and correct unlawful harassment claims as their best defense for responding to harassment charges."

Customized training

Sacramento's Shaw Law Group, LC, has been offering sexual harassment prevention and other Equal Employment Opportunity (EEO) compliance trainings for 25 years. The firm has worked with state agencies, cities



Eric Glassman, Shaw Law Group, Sacramento

and counties, Bay Area tech companies, and other familiar names including Ross Stores, Raley's Supermarkets, Sutter Health, Whole Foods, CVS Pharmacy and KQED. One attorney at the firm, Eric Glassman, is a member of the Association of Workplace Investigators and has been conducting trainings for Shaw for eight years, working with 10,000 to 20,000 people annually.

Under the law, an employer can meet its requirements to provide training

through several different platforms. It could be live, by webinar, or via a slide-and-video presentation like the one on the Department of Fair Employment and Housing's website. The DFEH training, subtitled "A Workplace of Respect," works somewhat like online traffic school. The user is presented with material, takes short quizzes as they progress and earns a certificate at the end.

The trainings by Glassman are conducted in-person and tailored for the specific workplace. "Nobody ever started their day saying, 'Yahoo! I get to do some EEO training today,'" he says with a laugh. "I find that people coming out of the session are in much better moods than when they arrived because we do our best to keep it interesting, and we include what's in the news. Lately, we've been talking about the pandemic and its implications on EEO issues. I do see some participants, at least initially, reluctant because they think they are going to be force-fed ideas that they might not agree with."

According to Glassman, supervisory personnel respond well to the training because this requirement has existed for managers going on 20 years, and in large companies, many of the supervisors have

Workplace Discrimination & Harassment Protected Classes

The California Department of Fair Employment and Housing (DFEH) protects individuals from illegal discrimination and harassment in employment based on the individual's actual or perceived background, which includes the following, in alphabetical order.

- Ancestry
- Age (40 and above)
- Color
- Disability (physical, mental, HIV and AIDS)
- Genetic Information
- Gender Identity, Gender Expression
- Marital Status
- Medical Condition
- Military or Veteran Status
- National Origin (includes language use)
- Race (including, but not limited to, hair texture and protective hairstyles—braids, locks, twists)
- Religion (includes religious dress and grooming practices)
- Sex/Gender (includes pregnancy, childbirth, breastfeeding and/or related medical conditions)
- Sexual Orientation

Complaints must be filed within three years of the last act of discrimination/harassment. To make a complaint, write to center@dfeh.ca.gov, or call (800) 700-2320. dfeh.ca.gov

been through the training many times. Often the employees will bring topic points to the discussion from outside of work, discrimination issues that have to do with their friends or families.

"They want to know what their own rights are," Glassman continues. "For example, one person says, 'My daughter got a job at the local fast-food place and co-workers are hitting on her. She's gone to her boss for help and the boss is completely unresponsive. What can I do to support my kid?'"

While sexual harassment scandals in the last several years have been a focus, Glassman finds that people are just as interested in learning about other forms of potential discrimination, harassment and retaliation. Those three concepts are different, but they all center around people being treated unfairly or inappropriately based on a legal protection.

promise, "Sleep with me and I'll make you a star." The second type is hostile work environment harassment, which involves someone being treated inappropriately, and it is applied to a legal protection. Sometimes the second form of harassment is more subtle to detect and there are more gray areas.

"Here's a broad example. Somebody is picking on me because I'm a San Francisco Giants fan, or they don't like the shirt I wear, or they think my car is a junker. I might be treated awfully, I might consider it hostile, but it is not against the law. If, however, I can show that the person is treating me badly because I'm Mormon or Catholic or Atheist or over 40 years old, because I'm gay, I'm straight, because I'm African American, that potentially becomes a hostile work environment claim, which is then a legal violation."

California's laws tend to be much more extensive than the

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"Here's the trick," says Glassman. "For most of us, the phrase 'hostile work environment' means an unpleasant place—people are nasty to me, nobody says hello to me, somebody is parked in my spot, making my life unpleasant. However capital H, capital W, capital E under law is a legal term and must meet the statutory definition."

Glassman explains that California recognizes two forms of illegal workplace harassment. One type of harassment is called *quid pro quo*, (this for that). It's Harvey Weinstein casting-couch kind of behavior, a demand for sex coupled with a demand or a

federal statutes. Federal law covers businesses with 15 or more employees, while California law covers businesses with one or more employees for harassment, and businesses with five or more employees for discrimination and retaliation. Federal law does not cover interns, volunteers and independent contractors from harassment. California does. It is also worth noting that employees are also protected from harassment by clients and vendors as well as their co-workers or bosses.

Glassman notes that in 2018 and 2019, his trainees had more concerns about gender-related issues, but in 2020, they had more

What Kinds of Behaviors are Considered Sexual Harassment?

When it comes to workplace harassment, behaviors in the area of sexuality are what usually come to mind first. The online training program at the California Department of Fair Employment and Housing (DFEH) notes that six in 10 women and three in 10 men have been sexually harassed sometime in their life, according to a study by the Pew Research Center. Additionally, 90% of transgender individuals are harassed or discriminated against on the job, according to The Williams Institute on Sexual Orientation Law.

But what exactly are the behaviors that constitute sexual harassment? Unwanted kissing, requests for sexual favors, a slap on the butt, touching of breasts or genitals, and cornering someone in a tight space are clearly sexual harassment. But there are more subtle actions that can be lawfully inappropriate conduct if they *happen often or are severe enough* to make an employee uncomfortable, intimidated or distracted to a degree that interferes with their work.

Here are some more subtle examples: repeated compliments on an employee's appearance; asking an employee about his or her sex life; discussing one's own sex life in front of an employee; circulating photos of male or female nudes or women in bikinis and shirtless men; making unwelcome sexually-charged comments or off-color jokes; leaving unwanted gifts of a sexual or romantic nature; spreading sexual rumors about an employee; persistent touching (such as a hand on an employee's back); sending suggestive emails or texts.

Along with the above list, *nolo.com* legal encyclopedia notes that severe or pervasive harassment can be same-sex or opposite-sex directed and does not need to be motivated by sexual desire. *Sexist* language and actions can also be harassment—for instance, hostile comments about how a woman or a man is supposed to act, talk, look or behave. Another example would be if a woman's work is deliberately sabotaged by male co-workers.

Most people understand that sexual harassment by a manager or co-worker is illegal, however under Title VII, an employer has a responsibility to protect employees from outsiders as well, including customers, clients, business partners and vendors. (And, it doesn't matter how important that person may be!)

concerns about race. There seems again an obvious connection with what was happening in the social milieu. "As the news changes, the training changes. We update the material constantly and that's what keeps it engaging. In the old days, we talked about being a bystander," adds Glassman. "If you see a co-worker in harm's way, what is your obligation? There is no Good Samaritan law that requires you to go to bat for a co-worker who is being mistreated. Only a supervisor or manager or a boss has mandatory reporting obligations. What I am trying to get through is this idea of being an upstander—a good human being as a matter of ethics. You ask, how can I support my coworkers who might be disadvantaged based on who they are? How can I be an ally for coworkers who identify in the LGBTQ community or other group and are being disadvantaged or mistreated?"

Another important aspect of the trainings is to encourage people to act on their own behalf and speak up. Sometimes a female employee might be harassed by a volunteer at the organization, or a salesperson passing through the office, with an inappropriate remark or touch. The employee might be shocked into silence. She might be afraid of getting an important person in trouble, hesitant to make waves, or just plain embarrassed. It's easier to pretend it didn't happen and avoid the offender ever after. "The only way we are going to get workplaces that are transparent and equitable for everybody is if we feel free to talk about things," says Glassman. "The way to end this kind of Neanderthal behavior is to call it out. My interest in doing this training is not necessarily just to keep the employer out of hot water, but to make sure everyone is treated fairly, knows what their rights are, and to help folks adjust to the workplace of 2021."

Reporting harassment in the workplace

Jennifer Douglas, of Santa Rosa's Dickenson, Peatman & Fogarty (DP&F), is a co-managing partner and head of the law firm's labor and employment department. During her 20-plus year career, Douglas has done both harassment trainings and investigations. She's noticed that claims have decreased, either because incidents have decreased or because employers have handled them more quietly and swiftly. "Employers have also been far more consumed with COVID-19 issues, which may also be overshadowing harassment issues," she says.

"Especially since 2017 with MeToo, there has been a shift," she says. "Companies have been quick to make decisions about shedding those toxic individuals who are engaging in inappropriate behavior, even to getting rid of people at the top who have allegations against them. That has been a dramatic change. It's not necessarily the training that's the cause (although that's contributed), but it's the publicity. No one wants bad



Jennifer Douglas, Dickenson, Peatman & Forgarty

publicity." According to Douglas, the publicity associated with a harassment claim negatively impacts employee morale, as well as a company's brand in the marketplace. "No one wants to be associated with an employer who is perceived to have a hostile work environment," she adds.

Regarding the value of harassment training, Douglas says, "You can have the best policies in the world in your handbook, but let's be honest, who reads the handbook?" The employer should ensure that their employees know that there are avenues through which they can complain, people they can go to, and a forum where their workplace concerns are heard. She tells her clients how important it is to encourage employees to report harassment they witness or experience. "You want employees to come to you so you can

address it. You don't want them to go get a lawyer, you don't want them to go to the state, you want them to come to you, so you can nip in the bud whatever is going on. Ultimately, I repeatedly tell my clients, the goal is to have a workplace where everyone feels respected and comfortable coming to work."

Douglas says she hasn't seen AAPI (Asian American and Pacific Islander) harassment locally, even in the face of the pandemic, but that Black Lives Matter is much more in the consciousness of people.

"Again, from a public relations standpoint, you want to be seen as aware and as taking a stand," says Douglas. "This has been

Harassment Training 2021

Anyone not yet trained—or trained in 2019—must have harassment prevention training in 2021. By law, employers must:

- Distribute a pamphlet on sexual harassment to all employees.
- Display the DFEH poster, which includes information on the illegality of sexual harassment and discrimination.
- Display the required Transgender Rights in the Workplace poster.

Several private sources offer English and Spanish training sessions. At the California Department of Fair Employment and Housing website there are click-and-watch trainings offered free of charge in six languages for both supervisory and non-supervisory personnel. A certificate of completion is available for finishing the online training, which is regularly updated to account for legal and policy developments. For more information, visit dfeh.ca.gov.

problematic for some companies with the best intentions who then get pushback. Employees would point out examples that were not in alignment with that 'woke' stance. These can be treacherous waters to navigate."

When you have a situation that goes beyond a questionable text message and turns into persistent and serious behavior that makes someone declare, "I can't walk into this office without feeling uncomfortable," an investigation needs to take place.

Investigators typically get involved prior to, or instead of, any litigation. When someone raises a serious concern, such as being treated differently because of sexuality or race, or is fired for turning 60. It's important to have an independent fact-finder. The qualified investigator sits down and talks to all parties—the person making the complaint, the person who is being complained about, and other individuals in the workplace who might have seen the behavior. Documents are reviewed. Then the investigator analyzes all the evidence to determine if it's likely or not that whatever is being alleged has occurred.

Douglas says her clients are taking a range of disciplinary or corrective action. In one case, a client fired the person for engaging in inappropriate behavior, even though the investigation was not conclusive. "This is not like a criminal case," says Douglas. "You're not the police. It's not your job to know for a certainty that this person engaged in unlawful behavior. Sometimes a person is surprised, even mortified, that something they did was wrong. You might provide training or counseling, or terminate the employee, it depends. All you are looking at, based on the info you have, is that someone violated company policy, and this is not the kind of behavior you want to tolerate in your workplace."

There is never a favorable outcome from litigation, says Douglas. "Even if you are 100% right in a lawsuit with an employee, you don't get your attorney's fees back; a lot of time and money is involved to resolve it." She says some companies chose to get Employment Practices Liability Insurance, even though

it is expensive and has a high deductible.

Many human resource professionals are skilled, but not licensed to investigate. Douglas cautions that if a client thinks the report resulting from a harassment complaint will be part of a legal case, the investigator involved must be an attorney or a licensed investigator. That is necessary for the report to be admissible

as evidence. California Business and Professions Code Sections 7520-7539, provide that an external consultant hired to conduct a workplace investigation must be a state-licensed private investigator or state-licensed attorney. For practical purposes, this means that employers should either do the investigation in-house or hire an attorney or licensed private investigator. Human resource consultants are excellent resources for many things, however, they

are not licensed by the state and therefore cannot legally conduct such investigations.

Douglas admits that since she represents employers and is an employer herself, she is "a little biased." But the bottom line is that her clients, whether they employ 500 people or six, are still businesses and they want their businesses to succeed. When she conducts training, she emphasizes that no employer is perfect, and it is difficult to control other people. Employees bring their own stories to the workplace and it can be messy with human emotions and bad days. Still, everyone wants to operate in an environment where they are valued, feel at ease and can be confident enough to speak up when something problematic happens. "The goal is to have a workplace where everyone is respected and feels comfortable coming to work," she says.

Answering a question about recent cases of alleged sexual harassment reported in local news, Douglas notes that power is at the center of it. "What sticks with people who read about both the Foppoli and Sonoma Academy sexual abuse stories—and what was the biggest complaint of the victims—is this. An abuse of power went unchecked. It should have been stopped sooner. That's the takeaway." ■

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