

Sexual Harassment Prevention: The California Law

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- Read the enclosed course.
- Complete the questions at the end of the course.
- Return your completed Answer Sheet to NetCE by mail or fax, or complete online at www.NetCE.com. Your postmark or facsimile date will be used as your completion date.
- Receive your Certificate(s) of Completion by mail, fax, or email.

Faculty

Lauren E. Evans, MSW, received her Master's degree in Social Work from California State University, Sacramento, in 2008. Her focus was on political and community social work. She has also been a Registered International Instructor of Therapeutic Horseback Riding through the Professional Association of Therapeutic Horsemanship International (PATH Intl.) since 2006. She currently works as a mental health practitioner with the homeless population.

Faculty Disclosure

Contributing faculty, Lauren E. Evans, MSW, has disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

Division Planner

William E. Frey, DDS, MS, FICD

Director of Development and Academic Affairs

Sarah Campbell

Division Planner/Director Disclosure

The division planner and director have disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

Audience

This course is designed for dental professionals who may act to prevent sexual harassment.

Accreditations & Approvals

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Designations of Credit

NetCE designates this activity for 2 continuing education credits.

AGD Subject Code 550.

This course meets the Dental Board of California's requirements for 2 units of continuing education.

Dental Board of California course #02-3841-00334.

Special Approvals

This course is designed to meet the California requirement for sexual harassment and abusive conduct prevention training for non-supervisory and supervisory employees.

About the Sponsor

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Course Objective

The purpose of this course is to provide information on what constitutes sexual harassment, how to prevent it in the workplace, and to define the roles and responsibilities of creating a safe work environment as it applies to both supervisors and employees.

Learning Objectives

Upon completion of this course, you should be able to:

1. Define terms related to workplace sexual harassment.
2. Describe the requirements and responsibilities of workplaces, employees and supervisors in identifying, reporting, responding to, and preventing workplace harassment.

INTRODUCTION

Sexual harassment in the workplace is a longstanding issue. Discrimination based on sex was first addressed legally in 1964, with Title VII of the Civil Rights Act, which prohibited employment discrimination based on race, color, religion, sex, and national origin [1]. In 1975, the term “sexual harassment” was first used to describe unwanted sexual advances in the workplace [2]. While originally the term “sex” in Title VII was largely interpreted as protection for women and pregnancy in the workplace, in 1998, the Supreme Court determined that the definition included any sex regardless of the victim’s or harasser’s sex [1; 9]. Throughout the following decades, the topic of sexual harassment has been revisited, most recently reignited by the 2017 #MeToo movement, which aimed to bring awareness about the widespread scope of sexual harassment and assault [1].

Additional legislation has been enacted to prevent sexual harassment and protect victims of sexual harassment. In 2019, California Senate Bill 1343 was signed, requiring businesses with more than five employees to provide harassment prevention training every two years before January 1, 2021, for current employees; employees newly hired after that date must receive training within six months of the hire date. Employees are required one hour of training, and supervisors and managers are required two hours [3].

The purpose of this course is to provide information on what constitutes sexual harassment, how to prevent it in the workplace, and to define the roles and responsibilities of creating a safe work environment as it applies to both supervisors and employees. Throughout this course, examples will be provided to enhance understanding of concepts.

DEFINITIONS

In order to address and prevent sexual harassment, it is essential for employees and supervisors to understand various definitions that fall under the term harassment. The following terms are defined according to California law.

Harassment: Any “unwelcome conduct that is based on race, color, religion, sex, national origin, age, disability, or genetic information” [4]. The California Civil Rights Department (CRD) (previously the Department of Fair Employment and Housing or DFEH) indicates that employees are protected from illegal discrimination and harassment based on their actual or perceived: ancestry; age; color; disability; genetic information; gender identity; gender expression; marital status; medical condition; military or veteran status; national origin; race; religion; sex/gender; and sexual orientation. While harassment is not necessarily illegal, it can become unlawful when the offensive conduct creates a work environment that is considered intimidating, hostile, or abusive, or when enduring that conduct becomes a condition of employment [4].

Discrimination: The differential treatment of an individual or group of people based on their race, color, national origin, religion, sex (including pregnancy and gender identity), age, marital and parental status, disability, sexual orientation, or genetic information [4].

Sexual harassment: Includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature or based on the victim’s sex. It is important to note that sexual harassment does not have to be sexual in nature and can include offensive remarks, spreading rumors, sabotaging work assignments, vandalizing personal belongings, or anything that constitutes harassment based on a person’s sex, sexual orientation, or pregnancy/parental status. Sexual harassment

may be perpetrated by a woman or a man, and the victim does not have to be of the opposite sex. In addition, the victim does not have to be the person harassed but could be anyone vicariously affected by the offensive conduct. Like harassment, it becomes unlawful when the frequency or severity creates a hostile or offensive work environment, or when it affects a victim's employment [5; 7].

Example: Nurse Practitioner L is a gay man, 36 years of age. Since graduating and beginning his new job almost four months ago, he has been teased by two of his female co-workers. While it was light teasing in the beginning, it has now come to the point where most communication involves comments and suggestive remarks about his sexual orientation. The number of individuals now making similar comments has grown, and L feels self-conscious and hurt by the continual teasing.

Discussion: Although L is not being directly propositioned by his co-workers, he is still experiencing sexual harassment, as well as discrimination. In this case, any of the individuals witnessing or participating should have reported the behavior.

Quid pro quo harassment: A type of harassment in which a person in position of authority or power implies or expressly demands something from the victim in exchange for a benefit (e.g., promotion) or to avoid a punishment (e.g., termination) in the workplace. Quid pro quo is Latin for "something for something" [7].

Example: Nurse C is applying for a promotion within her hospital. A member from the interview panel, Mr. R, asks her to go to dinner with him to discuss job details. Nurse C asks if the meeting would include other members from the panel and is told that it would just be the two of them and he would help prepare her for some of the questions. Nurse C feels uncomfortable and asks if it can be scheduled at work, to which Mr. R replies that he is quite busy during the day. A few days before the interview, Mr.

R again asks Nurse C if she is available for dinner, and she again declines. Later in the day, Nurse C is told that Mr. R was speaking to another member of the interview panel and suggested that Nurse C may not be the most qualified for the position. Nurse C decides to notify her human resources representative and request that an alternate hiring member be appointed. This request is approved based on the facts that Mr. R asked for a private meeting twice and declined an alternate and neutral location.

Discussion: While not necessarily illegal, this situation made Nurse C uncomfortable and left her wondering if her rejection of dinner plans upset Mr. R and hurt her chances of getting the promotion. Because Mr. R was in a position of authority, it was determined that there was potential for bias and quid pro quo harassment. Mr. R was counseled that the actions were inappropriate, and Nurse C no longer felt pressured that her decisions put her interview in jeopardy.

Hostile work environment harassment: A type of harassment in which behaviors or actions of others negatively affect an employee's work environment and/or job performance. Hostile work environment harassment can be committed by anyone in the work environment, including supervisors, peers, subordinates, vendors, customers, or contractors [7].

Retaliation: The act of punishing job applicants or employees for asserting their rights to be free from employment discrimination, including harassment. It is unlawful to retaliate for filing or being a witness to a complaint; reporting discrimination or harassment to a supervisor or manager; and/or resisting sexual advances or intervening to protect others. Participating in a complaint process is protected from retaliation under all circumstances. Retaliation can include demotions, verbal and/or physical abuse, threats, and creating a work environment that places undue stress on an employee, such as schedule changes or denying personnel assistance or job-related equipment [6].

Example: Mr. and Mrs. H are husband and wife, both nurses, and have two school-aged children and a toddler at home. Mrs. H works night shift in the emergency department (ED), and Mr. H works day shift in an orthopedic clinic, allowing them to be present for their children and their varying schedules. Mrs. H has recently come forward to report a male peer, Nurse A, making sexually inappropriate comments to a co-worker about the women he sees in the ED. She has witnessed this several times per week over the course of nearly one year. Mrs. H hesitated to tell her supervisor because Supervisor B is good friends with Nurse A outside of work. The Supervisor agrees to begin an investigation, but after two weeks, Mrs. H is moved to the day shift as an attempt to separate the two nurses. Mrs. H objects to the change in schedule because it will cause a hardship on her parenting schedule; however, Supervisor B tells her that Nurse A has been with the department longer and this is the best solution to prevent conflict.

Discussion: Because reporting that her colleague's behavior negatively affected the work environment resulted in her then removed from a schedule that was beneficial to her family, these actions created a hostile work environment and constitute retaliation. Mrs. H does not have to be the direct subject of the harassment to receive protection.

STATISTICS

In 2018, the Pew Research Center conducted a study to determine the prevalence of sexual harassment in the workplace and how the #MeToo movement affected thoughts regarding the topic. It is important to note that this study was conducted in 2018, before the passage of SB 1343 mandating sexual harassment training in California workplaces. More research is needed to ascertain the effect of this renewed attention and legislation addressing the subject.

Data from the Pew Research study indicated that 44% of individuals in the United States have received unwanted sexual advances or verbal or physical harassment of a sexual nature. Among women, 59% had ever experienced sexual harass-

ment; 69% of these incidents were in a professional or workplace setting. Among men, 27% had ever experienced sexual harassment, and 61% of these incidents were in a professional workplace setting [8]. It is evident that workplace sexual harassment is a major issue, given that such a large portion of the population has been a victim [8].

Among the gender and sexual minority (LGBTQ+) community, 68% overall indicated being sexually harassed in the workplace in a 2019 survey, a percentage larger than that of the general public. Among those who had experienced sexual harassment, 66% did not report it to a supervisor or employer. Among the reasons for not reporting included fear of negative impact on relationships at work (57%); fear of a negative impact on their career (44%); and fear they would be "outed" at work (25%) [10].

WORKPLACE REQUIREMENTS

Every workplace is lawfully required to take reasonable steps to prevent and correct discrimination and harassment and create a respectful work environment. All supervisors and employees should be required to sign an acknowledgement of the policies and procedures and receive ongoing reminders and training [5; 12].

Often, a human resource representative will provide the required information for supervisors and employees; however, it is the responsibility of all employees to understand these requirements and ensure that the requirements are being adhered to. Mandates from the CRD indicate that the following items must be provided for employees [12]:

- Distribution of a document that complies with Government Code 12950. Free documents are provided by the CRD, although companies may choose to provide their own.
- A posted copy of the CRD employment poster "California Law Prohibits Workplace Discrimination and Harassment."

- A harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. This policy must:
 - Be in writing.
 - List all protected groups under California's Fair Employment & Housing Act (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. This 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 CRD and the U.S. Equal Employment Opportunity Commission (EEOC) 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.
 - 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.

Employers should distribute their 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 acknowledgment form for employees to sign and return
- Sending the policy via e-mail 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
- Using any other method that ensures employees received and understand the policy

If the employer's workforce at any facility or establishment contains 10% or more of persons who speak a language other than English as their preferred language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least 10% of the workforce.

As noted, employers who do business in California and employ five or more part-time or full-time employees must provide at least one hour of training regarding the prevention of sexual harassment, including harassment based on gender identity, gender expression, and sexual orientation, to each non-supervisory employee and two hours of such

training to each supervisory employee. Beginning January 1, 2021, new supervisory employees must be trained within six months of assuming their supervisory position, and new non-supervisory employees must be trained within six months of hire. Employees must be retrained at least once every two years.

EMPLOYEE AND SUPERVISOR RESPONSIBILITIES

All supervisors and employees have an obligation to promote a safe work environment and can be held personally liable if this expectation is not upheld. If a behavior is reported, regardless of whether the individual is the target of the harassment, it is necessary to determine if a hostile work environment and/or harassment is occurring. A hostile work environment occurs when undesirable or unwanted conduct interferes with an individual's job performance or creates an intimidating, hostile, or offensive workplace. It is important to note that the source of a hostile work environment does not have to be an employee; the source could also be a vendor, customer, or contractor.

EMPLOYEE-SPECIFIC RESPONSIBILITIES

All employees have an obligation to report harassment. Sexual harassment can be based on sex, gender, and sexual orientation, and the person reporting does not have to be the direct target. It is best to follow the saying, "If you see something, say something." Reporting a hostile work environment or sexual harassment is a role that should be filled by all employees [11].

SUPERVISOR-SPECIFIC RESPONSIBILITIES

A supervisor is required to act on any reports of sexual harassment, whether mild or serious in nature. Mild behavior, such as an off-handed comment, can often be resolved by counseling the offending party. For more serious complaints, an unbiased investigation must take place after a complaint is

filed. During this investigation, relevant information should be collected, reviewed, and analyzed to reach a fair conclusion. It is the supervisor's role to promptly begin the investigation process. The supervisor does not need to be the one to conduct the investigation and must not if there is any bias. A trained impartial individual of greater authority than the accused should conduct the investigation. Often, a representative from human resources, either internally or contracted, will conduct investigations of matters of harassment.

Example: *A complaint of continual sexual jokes and personal encounters in the breakroom by Ms. R is reported to Supervisor S. Supervisor S is friends with Ms. R, and while she does not think that Ms. R is being malicious, Supervisor S must take the complaint seriously and refer Ms. R to a human resource individual.*

Discussion: *Although Ms. R is a friend of the supervisor, any complaint should be acknowledged. Supervisor S takes the correct step by referring the complaint to an impartial party. Human resources will begin an investigation to determine if counseling Ms. R will ameliorate the situation or if further action is required.*

Conducting an Investigation

After a complaint is filed, an investigation begins by completing a thorough interview with the victim(s) and accused person(s), preferably in person. All allegations should be revealed during the interview, and the accused should be given an opportunity to respond. After the initial interview, any relevant witnesses should be interviewed, and all relevant evidence gathered. After a full analysis of all information, a reasonable and fair conclusion should be reached [11]. It is important to note that a legal assumption should not be made, but thorough documentation should occur, including any disciplinary action. If legal action is requested, the individual should be provided with contact information for regulatory boards such as the FEHA, EEOC, or other administrative state or local agencies.

HARASSMENT REDUCTION AND PREVENTION

Preventing harassment is best accomplished by a very clear policy that promotes intolerance to any type of discrimination. As discussed, ways to prevent harassment can be accomplished through:

- Thorough and concise policies and procedures
- Ensuring all employees and supervisors understand their responsibilities
- Awareness through required distribution of information and posters
- Providing information for reporting processes and resources
- Creating a respectful and inclusive work environment
- Making information accessible in different languages

PREVENTING RETALIATION

The following information regarding preventing retaliation has been provided by the EEOC [6].

The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination, including harassment. Asserting these EEO rights is called “protected activity,” and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for [6]:

- Filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- Communicating with a supervisor or manager about employment discrimination, including harassment
- Answering questions during an employer investigation of alleged harassment
- Refusing to follow orders that would result in discrimination
- Resisting sexual advances or intervening to protect others

- Requesting accommodation of a disability or for a religious practice
- Asking managers or coworkers about salary information to uncover potentially discriminatory wages

Participating in a complaint process is protected from retaliation under all circumstances. Other acts to oppose discrimination are protected so long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe it.

Engaging in EEO activity, however, does not shield an employee from all discipline or discharge. Employers are free to discipline or terminate workers if motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences. However, an employer is not allowed to respond to EEO activity in any way that would discourage someone from resisting or complaining about future discrimination.

For example, depending on the facts, it could be retaliation if an employer acts because of the employee’s EEO activity to:

- Reprimand the employee or give a performance evaluation that is lower than warranted
- Transfer the employee to a less desirable position
- Engage in verbal or physical abuse
- Threaten to make or actually make reports to authorities (such as reporting immigration status or contacting the police)
- Increase scrutiny
- Spread false rumors
- Treat a family member negatively (e.g., cancel a contract with the person’s spouse)
- Make the person’s work more difficult (e.g., punishing an employee for an EEO complaint by purposefully changing his or her work schedule to conflict with family responsibilities)

LANGUAGE CONSIDERATIONS

In the multicultural landscape of the United States today, it is possible that not all employees define harassment in the same way, and not all employees and/or witnesses will be able to describe harassment. In these cases, interpreters are a valuable resource to help bridge communication and cultural gaps. If any party has limited English proficiency, an interpreter (live or over the phone) should be accessed in conjunction with a supervisor or human resource individual. Due to the sensitive nature of the interviews, some employees may be embarrassed to discuss the matter with a third party. Even if an interpreter is initially declined, continue to assess the necessity of interpretation assistance. Family members are not considered appropriate interpreters.

As noted previously, any workplace containing 10% or more of persons who speak a language other than English as their spoken language must translate the harassment, discrimination, and retaliation policy into that language. It is also required that posters and informational materials should be available in different languages.

RESOURCES

California Civil Rights Department (CRD)

<https://calcivilrights.ca.gov>

Sexual Harassment Poster

https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/09/DFEH_SexualHarassment-Poster.pdf

U.S. Equal Employment Opportunity Commission

<https://www.eeoc.gov>

RALIANCE

<http://www.raliance.org>

National Sexual Violence Resource Center

<https://www.nsvrc.org>

TIME'S UP Healthcare

<https://timesupfoundation.org/work/times-up-healthcare>

Legal Aid At Work

<https://legalaidatwork.org>

CONCLUSION

As noted, sexual harassment in the workplace is a longstanding issue that has received renewed attention and legislation to help make the workplace safe for all. California Senate Bill 1343 was signed in 2019, requiring businesses with more than five employees to provide harassment prevention training with the goal of significantly decreasing sexual harassment in the workplace.

This course meets the California requirement of sexual harassment training of one hour for employees and two hours for supervisors that must be completed every two years. Throughout this course, information regarding what constitutes sexual harassment, how to prevent it in the workplace, employer responsibilities, employee and supervisor roles and responsibilities, and multicultural considerations have been provided. Scenarios that pertain to multiple situations have also been addressed to further understanding of what may or may not constitute sexual harassment. A safe work environment is the right of every individual.

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