

# PROTECTING YOUR WORK ENVIRONMENT FROM SEXUAL HARASSMENT

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# Should You Be Worried About Sexual Harassment In The Workplace?



## Yes!

- #metoo movement.
- Occurs in every industry.
- Unsafe and unproductive work environment.
- Risk of lawsuits and scandals.
- Presumed liability unless preventative measures.
- Ignorance - No Excuse.

# What Should You Do To Prevent Sexual Harassment Or Limit Your Exposure?

## Written Sexual Harassment Policy Contents

- Definition of sexual harassment with examples.
- Complaint procedures.
- Employee acknowledgement of receipt.

## Conduct Training (At Least Every 2 Years)

- All employees must attend.
- Can be on-line or in-person.
- Separate training for supervisors and managers. (Required in CA, CT, and MN.)
- Attendance – employees should sign sheet.



# Does Training Even Work?

## Probably Not. Studies Show The Following:

- No change in behavior after training.
- Managers and supervisors have trouble identifying and addressing harassment.
- Knowledge only improves among men.
- Employees who already believe that their employers tolerate sexual harassment are less likely to benefit from training.



# If Training Doesn't Work, Why Bother Investing In It?



## Training Can Limit Corporate Liability

- The U.S. Supreme Court has repeatedly ruled that for a company to avoid liability for sexual harassment, it had to show that it had trained employees on its anti-harassment policies.
- Bottom line: Even though training may not stop sexual harassment from occurring, and probably won't stop your company from being sued, it can prevent a jury from finding your company liable.

# Who Are The Potential “Players” In Sexual Harassment Cases?



## Who Can Commit Sexual Harassment?

- Employees at all levels.
- Customers and vendors.
- Same or opposite sex.

## Who Can Sue For Sexual Harassment?

- Employees who are targeted by statements or actions.
- Employees who are simply bystanders.

## Who Can Be Sued For Sexual Harassment?

- Federal law: Only the company.
- Most state laws: The company and individuals (e.g., officers, supervisors, etc.).

# What Is Sexual Harassment?



## Sexual Harassment Defined

- Unwelcome sexual advances.
- Requests for sexual favors.
- Other verbal or physical conduct of a sexual nature that,
  - Affects an individual's employment;
  - Unreasonably interferes with work performance; or
  - creates an intimidating, hostile or offensive work environment.

## Types Of Sexual Harassment

- Quid pro quo.
- Hostile work environment.

# Quid Pro Quo Sexual Harassment



## Quid Pro Quo Defined

- Submission to such conduct is made a term or condition of an individual's employment.
- Harasser has position of power or authority.
- Harassment must result in "tangible employment action" (e.g., termination, loss of compensation, discipline, etc.).



# Hostile Work Environment Sexual Harassment

## Hostile Work Environment Defined

- Verbal or physical conduct of a sexual nature.
- Conduct must be unwelcome.
- Conduct must be sufficiently “severe” or “pervasive” to alter the conditions of employment.
- The more severe the conduct, the less often it needs to occur.
  - Attempted rape: Only single incident required.
  - Name calling or sending sexually suggestive texts/emails: Generally, 4-5 times over several few months; otherwise, just random “stray remarks.”



# Examples Of Hostile Work Environment Sexual Harassment

## Physical Examples

- Leering, elevator eyes, winking.
- Grabbing, hugging, back rubs, patting.
- Flirting, stroking, pinching, posing.
- Undressing, clothing adjustments.
- Cornering or blocking.
- Stalking.
- Standing or sitting too close to someone.



# Examples Of Hostile Work Environment Sexual Harassment

## Verbal And Other Examples

- Sexually degrading comments.
- Name calling.
- Sexual comments and jokes.
- Whistling, barking, grunts, or growling.
- Inappropriate e-mails, texts, videos (e.g., pornography, Tosh 2.0).
- Repeated requests for a date, even though no reciprocal interest.
- Sexist expressions such as “honey,” “dear” or “sweetheart.”



# Potential Exposure

## Damages Under Federal Law

- Back pay (up to 2 years), front pay, compensatory and punitive damages.
- Damages are capped depending on the number of employees.
  - 15 – 100: \$50,000
  - 101 – 200: \$100,000
  - 201 – 500: \$200,000
  - 500 or more: \$300,000
- **Attorneys' fees and costs are separate.**

## Damages Under State Law

- Many states don't place any monetary limits on the amount of corporate and/or personal damages (e.g., CA, HI, MA, NJ, OH, OR, VT, and VA).

# Potential Exposure

## The Economic And Legal Realities

- Can be sued at any time for anything. Even if bogus, still have to defend.
- Risk of having to pay other side's attorneys' fees.
- Even if harassment doesn't result in "tangible employment action," can still be liable unless:
  - Took reasonable care to prevent and promptly correct any harassment; and
  - Employee unreasonably failed to take advantage of complaint procedures.



# Limit Exposure By Conducting A Thorough Investigation

## The Internal Investigation Process

- Must be promptly conducted.
- Must be reasonable and unbiased.
- Separate parties during investigation (if possible).
- Interviews should *in person*, not over the phone.
- Interview complainant, harasser, and witnesses.
- Take notes.
- Put results in writing.
- Discuss remedial steps with victim and harasser.



# Limit Exposure By Conducting A Thorough Investigation

## The Internal Investigation Process

- Identify policy violations.
- Consider placing harasser on (un)paid leave during investigation.
- Consider restricting parties' access to files, computers and other employees.
- Determine credibility of accuser, harasser and witnesses.
- Keep all notes in confidential file.
- *Timely* follow up with the parties.
- Watch for signs of retaliation.



# Practical Tips To Prevent Sexual Harassment And/Or Limit Exposure

## Practical Tips

- Written policy isn't enough—you have to uniformly enforce it.
- Be careful about emails/texts—assume everything is discoverable.
- Listen and objectively discuss complaints. Employees sometimes just want to feel like they're being heard.
- Two employees should be present when meeting with disgruntled employees.
- Assume all conversations might be secretly tape recorded.
- Tell employees that confidentiality will be respected as much as possible, but cannot be ensured.
- Let it be known harassment won't be tolerated.
- Be prepared to impose severe discipline for those who break the rules.



# Practical Tips To Prevent Sexual Harassment And/Or Limit Exposure

## Practical Tips

- Institute policy that all complaints must be *immediately* reported in *writing* to human resources or one person.
- Managers and supervisors must act responsibly.
- Managers and supervisors cannot participate in or ignore harassment.
- Managers and supervisors must be held to higher standard.
- Managers and supervisors must understand that in most states they can be held *personally* liable if they sexually harass an employee.

# Practical Tips To Prevent Sexual Harassment And/Or Limit Your Exposure

## Practical Tips

- Sexual harassment can occur outside of work (e.g., holiday parties, business trips, sporting events, etc.).
- Recognize and address the fact that sexual harassment is more likely to occur if:
  - Workplace has a lot of young employees.
  - There are isolated work spaces.
  - There are significant cultural and language differences.
  - Work consists of monotonous or low-intensity tasks.
  - Rude or raunchy behavior is tolerated or encouraged.

# Hypothetical

Jeff supervises about 50 people in a large office, including Claudia and Steve. One day, Claudia tells Jeff that Steve is acting overly-friendly, he's asked her out twice, he frequently stands right behind her when she's typing away on her computer, and calls her "sexy" every now and again. Claudia concludes by saying that Steve makes her feel uncomfortable.

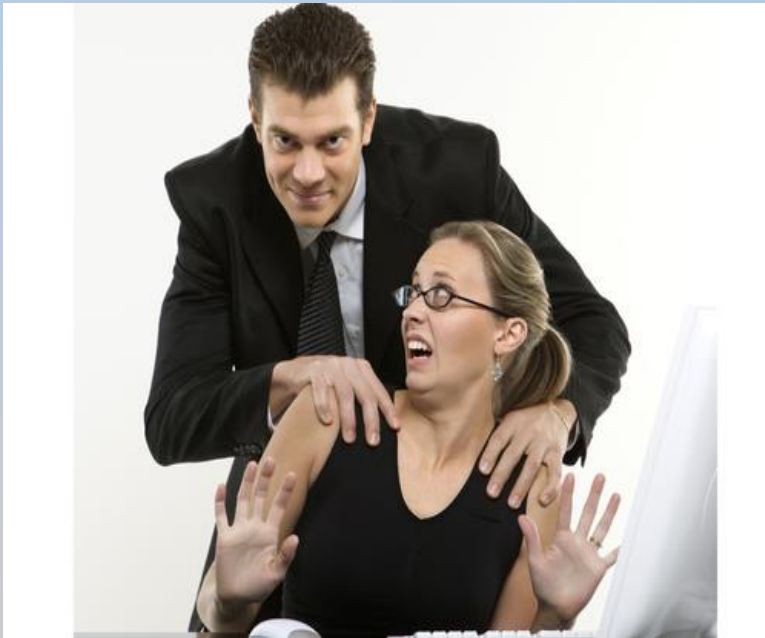
To Jeff, the situation doesn't sound much like sexual harassment, especially because Claudia tells everyone she's single, she usually wears tight and revealing clothes, and is known around the office to be quite a flirt. Jeff thinks the real reason why Claudia is complaining about Steve is because Steve received a bonus instead of her.

What, if anything, should Jeff do?

# Answer To Hypothetical

- Jeff must report Claudia's complaint to human resources.
- Jeff's subjective opinion about Claudia's clothes and reputation are irrelevant.
- Jeff should advise human resources concerning Claudia's possible motivation for complaining.
- Have human resources separate Claudia and Steve.
- Immediately advise Claudia that he reported her complaint to human resources.
- Make sure no one retaliates against Claudia or Steve.
- At the conclusion of the investigation, Jeff should work with human resources to implement any disciplinary action.

# THANK YOU!



# Sample Harassment, Discrimination, And Retaliation Prevention Policy

## PURPOSE

This Policy specifically applies to all of the Company's employment matters in California.

The purpose of this Policy is to establish a strong commitment to (1) prohibit harassment, discrimination, or retaliation in employment; (2) define discrimination, harassment, and retaliation; and (3) set forth a procedure for investigating and resolving such internal complaints. The Company encourages all covered individuals to report, as soon as possible, any conduct that is believed to violate this Policy.

## POLICY

The Company has a zero tolerance for any conduct that violates this Policy. Conduct need not arise to the level of a violation of law to violate this Policy. Instead, a single act can violate this Policy and provide grounds for discipline, up to and including termination.

Harassment or discrimination against an applicant or employee by a supervisor, manager, employee, co-worker, member of the public, contractor, supplier, or customer on the basis of race, color religion, sex (including gender, gender identity, gender expression, transgender, pregnancy, and breastfeeding), national origin, ancestry, physical or mental disability, medical condition, genetic characteristics or information, family and medical leave status, marital status, age, sexual orientation (including homosexuality, bisexuality, or heterosexuality), military or veteran status, or any other classification protected by law, will not be tolerated.

This Policy applies to all terms and conditions of employment in California, including, but not limited to, recruitment, examination, hiring, placement, appointment, promotion, disciplinary action, layoff, termination, re-employment, transfer, leave of absence, compensation, and training. All employees and persons providing services to the Company are required to immediately report any potential violations of this Policy to the Director of Human Resources. Supervisors and managers are required to immediately report any potential violations of this Rule to the Director of Human Resources in writing.

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Disciplinary action up to and including termination, will be instituted for prohibited behavior that violates this Policy.

At the time each employee receives a copy of this Policy, each employee will also receive a copy of the State of California Department of Fair Employment and Housing's sexual harassment pamphlet, DFEH-185.

Each employee will receive training regarding this Policy within the first six (6) months of hire and, on a recurring basis, no less than every three (3) years thereafter. Supervisors and managers will receive training regarding this Policy on a recurring basis, no less than every two (2) years following the initial post-employment training.

Any retaliation against a person for filing a harassment or discrimination charge or complaint, whether with the Company or an administrative agency or court, or for participating in any complaint process, or otherwise demonstrating support for such actions, is prohibited. Employees found to be retaliating against another employee will be subject to disciplinary action, up to and including termination.

## DEFINITIONS

**Protected Classification:** This Policy prohibits harassment or discrimination because of an individual's protected classification. "Protected Classification" includes age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of Family and Medical Care Leave, disability (mental and physical) including HIV and AIDS, marital status, medical condition (cancer and genetic characteristics), genetic information, military and veteran status, national origin (including language use restrictions), race, sex (which includes pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, childbirth or breastfeeding), gender, gender identity, gender expression, and sexual orientation.

1. "Gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.

# Sample Harassment, Discrimination, And Retaliation Prevention Policy

2. “Gender identity” means a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender.
3. “Transgender” is a general term that refers to 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. A transgender person may or may not identify as “transsexual.”

**Policy Coverage:** This Policy prohibits any of the Company’s employees, supervisors, managers, contractors, suppliers, or customers from harassing or discriminating against any of the Company’s applicants or employees because of (1) an individual’s protected classification; (2) the perception that an individual has a protected classification; or (3) the individual associates with a person who has or is perceived to have a protected classification.

**Harassment Defined:** Harassment may include, but is not limited to, the following types of behavior that is taken because of a person’s protected classification. Note that harassment is not limited to conduct that employers or employees take. Under certain circumstances, harassment can also include conduct taken by those who are not employees, such as contractors, suppliers, or customers:

1. “Speech” means such things as epithets, derogatory comments or slurs, and propositioning on the basis of a protected classification. This might include inappropriate comments on appearance, including dress or physical features, or dress consistent with gender identification, or race-oriented stories and jokes.
2. “Physical acts” means such things as assault, impeding or blocking movement, offensive touching, or any physical interference with normal work or movement. This includes pinching, grabbing, patting, propositioning, leering, or making explicit or implied job threats or promises in return for submission to physical acts.
3. “Visual acts” means such things as derogatory posters, cartoons, emails, pictures or drawings related to a protected classification.



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4. “Unwanted sexual advances” means such things as requests for sexual favors and other acts of a sexual nature, where submission is made a term or condition of employment, where submission to or rejection of the conduct is used as the basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual’s work performance or create an intimidating, hostile, or offensive working environment.

**Guidelines for Identifying Harassment:** To help clarify what is harassment or discrimination on the basis of a protected characteristic, use the following guidelines:

1. Harassment includes any conduct that would be “unwelcome” to an individual of the recipient’s same protected classification and that is taken because of the recipient’s protected classification.
2. It is no defense that the recipient appears to have voluntarily “consented” to the conduct at issue. A recipient might not protest for many legitimate reasons, including the need to avoid being insubordinate or to avoid being ostracized.
3. Simply because no one has complained about a joke, gesture, picture, physical contact, or comment does not mean that the conduct is welcome. Harassment can evolve over time. Small, isolated incidents might be tolerated up to a point. The fact that no one is complaining now does not preclude anyone from complaining if the conduct is repeated in the future.
4. Even visual, verbal, or physical conduct between two employees who appear to welcome the conduct can constitute harassment of a third applicant, officer, official, employee, or contractor who observes the conduct or learns about the conduct later. Conduct can constitute harassment even if it is not explicitly or specifically directed at an individual.
5. Conduct can constitute harassment in violation of this Policy even if the individual engaging in the conduct has no intention to harass. Even well-intentioned conduct can violate this Policy if the conduct is directed at or implicates a protected classification, and if an individual of the recipient’s same protected classification would find it offensive (e.g., gifts, over attention, endearing nicknames).

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## RETALIATION

Any adverse conduct taken because an applicant, employee, or contractor has reported harassment or discrimination, or has participated in the complaint and investigation process described herein, is prohibited. "Adverse conduct" includes, but is not limited to, taking adverse actions because an individual has reported harassment or discrimination, spreading rumors about a complainant, shunning and avoiding an individual who reports harassment or discrimination, or real or implied threats of intimidation to prevent an individual from reporting harassment or discrimination. The following individuals are protected from retaliation: those who make good faith reports of harassment or discrimination, and those who associate with an individual who is involved in reporting harassment or discrimination or who participates in the complaint or investigation process. A person who reports harassment or discrimination may be a complainant who uses the complaint procedure below or a third party or witness to the harassment or discrimination who reports the conduct.

## COMPLAINT PROCEDURE

### Filing a Complaint

An employee who believes he/she has been denied an equal employment opportunity or reasonable accommodation, or has been harassed or discriminated against, or retaliated against, is *required* to *immediately* make a complaint *in writing* to either the Director of Human Resources or to his/her immediate supervisor.

A job applicant who believes he/she has been denied an equal employment opportunity or reasonable accommodation, or has been harassed or discriminated against, or retaliated against, is *required* to *immediately* make a complaint *in writing* to the Director of Human Resources.

Any supervisor or manager who receives a harassment, discrimination, or retaliation complaint is *required* to *immediately* notify the Director of Human Resources *in writing*.

If the complaint concerns the Director of Human Resources, the applicant or employee is *required* to *immediately* make a complaint *in writing* to the Company President.

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An employee or job applicant may also file a complaint with the U.S. Equal Employment Opportunity Commission ([www.eeoc.gov](http://www.eeoc.gov)) or the State of California Department of Fair Employment and Housing ([www.dfeh.ca.gov](http://www.dfeh.ca.gov)).

## Advice and Counseling

An employee may seek advice and/or counseling concerning equal employment, reasonable accommodation, harassment, discrimination, and/or retaliation. Sources for this advice and/or counseling include, but are not limited to, the following agencies:

- The U.S. Equal Employment Opportunity Commission
- The State of California Department of Fair Employment and Housing

## INVESTIGATION

In the event that a violation of this Policy is alleged to have taken place, the Company will conduct a fair, timely, and thorough investigation, regardless of whether or not the recipient of the alleged action or a third party reports a potential violation.

Upon awareness or notification of the complaint, the Director of Human Resources or his/her designee will assign an investigator to gather facts and make factual findings concerning the grounds for the complaint.

The Director of Human Resources may take interim action to diffuse volatile circumstances, such as placing the alleged perpetrator on paid or unpaid administrative leave or temporarily transferring the alleged perpetrator. No interim action should be taken to change the complaining individual's working conditions, unless the complaining individual voluntarily consents to the temporary change. The investigator will review the complaint allegations.

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The investigator will review the complaint allegations. The investigation will normally include interviews with the reporting individual, the accused, and any other person who is believed to have relevant knowledge concerning the allegations. The investigator will remind all witnesses (1) to maintain the confidentiality of the content of the interview when appropriate, depending upon the facts, and when permitted by law, and (2) that retaliation against those who report alleged harassment, discrimination, retaliation, or failure to reasonably accommodate, or who participate in the investigation is prohibited.

The investigator will provide a written report to the Director of Human Resources, or to the Company's President if the Director of Human Resources is the subject of the investigation. Giving consideration to all factual information and the totality of the circumstances, the Director of Human Resources will determine whether the Company's policies have been violated, or whether discrimination or harassment has occurred, and, when the investigation has concluded, the Company will promptly communicate in writing to the complainant and the accused.

## **REMEDIAL AND DISCIPLINARY ACTION**

If at the conclusion of the investigation it is determined that that the alleged conduct occurred and that the conduct violated this Policy, the Company will notify the complainant and perpetrator of the general conclusion(s) of the investigation. If the Company determines that any violation(s) of this Policy occurred, the Company will take action designed to end the violation(s). Any employee determined to have violated this Policy may be subject to remedial and/or disciplinary action, up to and including termination. In the event that the Company takes remedial action, such action will be commensurate with the severity of the offense and the Company will take reasonable steps to protect the complainant from further harassment, discrimination, or retaliation, and to protect the complainant from retaliation as a result of communicating the complaint.

## **CONFIDENTIALITY**

To the extent possible, the Company will endeavor to maintain confidentiality in communicating or investigating any claims of alleged discrimination, harassment, retaliation, or failure to reasonably accommodate. While complete confidentiality may not be possible, the investigation will be conducted in a manner that ensures, to the extent feasible, the privacy of the parties involved.

# Sample Harassment, Discrimination, And Retaliation Prevention Policy

An individual who is interviewed during the course of an investigation is prohibited from discussing the substance of the interview, except as otherwise directed by the Director of Human Resources. Any individual who discusses the content of an investigatory interview will be subject to discipline or other appropriate sanction.

The Company will not disclose a completed investigation report except as it deems necessary to support a disciplinary action, to take remedial action, to defend itself in adversarial proceedings, or to comply with the law or a court order.

## **RESPONSIBILITIES**

Supervisors and managers are responsible for:

1. Informing employees of this Policy.
2. Modeling appropriate behavior.
3. Taking all reasonable steps necessary to prevent harassment, discrimination, or retaliation from occurring.
4. Receiving complaints in a fair and serious manner, and documenting steps taken to resolve complaints.
5. Monitoring the work environment and taking immediate appropriate action to stop potential violations, such as removing inappropriate pictures or correcting inappropriate language.
6. Following up with those who have complained to ensure that the behavior has stopped and that there are no reprisals.
7. Informing those who complain of harassment or discrimination of their option to contact the EEOC or DFEH regarding alleged Policy violations.
8. Assisting, advising, or consulting with employees and the Director of Human Resources regarding this Policy and Complaint Procedure.

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9. Assisting in the investigation of complaints involving employee(s) in their departments and, if the complaint is substantiated, recommending appropriate corrective or disciplinary action in accordance with the Company's policies and procedures, up to and including termination.
10. Implementing appropriate disciplinary and remedial actions.
11. Reporting potential violations of this Policy of which they become aware, regardless of whether a complaint has been submitted, to the Director of Human Resources or the President.
12. Participating in periodic training and scheduling employees for training.

Each employee is responsible for:

1. Treating all employees and contractors with respect and consideration.
2. Modeling appropriate behavior.
3. Participating in periodic training.
4. Fully cooperating with the Company's investigations by responding fully and truthfully to all questions posed during the investigation.
5. Maintaining confidentiality as required by this Policy.
6. Reporting any act he/she believes in good faith constitutes harassment, discrimination, or retaliation as defined in this Policy, to the Director of Human Resources or to his/her immediate supervisor.

# Sample Harassment, Discrimination, And Retaliation Prevention Policy

## ACKNOWLEDGEMENT OF RECEIPT

This acknowledges that I have received and read a copy of the Company's California Harassment, Discrimination, and Retaliation Prevention Policy, and the State of California Department of Fair Employment and Housing's sexual harassment pamphlet, DFEH-185.

I agree to abide by the terms and conditions of this Policy.

I agree to immediately report any violations of this Policy in compliance with the instructions contained within this Policy.

Employee's Name: \_\_\_\_\_  
(Please Print)

Employee's Signature: \_\_\_\_\_

Date: \_\_\_\_\_