

Mendocino Unified School District



Agenda

Board Study Session

MAY 5, 2021

**MENDOCINO K-8 SCHOOL
44261 LITTLE LAKE ROAD
MENDOCINO, CA 95460**

9:00 A.M to 12:00 A.M

VIA TELECONFERENCE

Join Zoom Meeting

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MUSD is not available for technical support for remote meetings.*

Board Priorities

- *Develop and expand community partnerships and communication*
- *Increase learning and achievement for all students, families, and staff*
- *Plan wisely for the future while maintaining fiscal integrity*
- *Maintain and improve the physical plant*

Any writings distributed either as part of the Board packet, or within 72 hours of a meeting, can be viewed at the District Office: 44141 Little Lake Road, Mendocino, CA 95460. Board backup materials are also located on the MUSD website at <http://www.mendocinoused.org/District/2285-Untitled.html>

In compliance with Government Code section 54954.2(a) Mendocino Unified School District will, on request, make agendas available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. Individuals who need this agenda in an alternative format or who need a disability related modification or accommodation in order to participate in the meeting should contact, Erin Placido Exec. Assistant to the Superintendent, in writing at P.O. Box 1154, Mendocino, CA 95460 or via email at doerin@mcn.org.

MENDOCINO UNIFIED SCHOOL DISTRICT IS PROUD TO BE AN EQUAL OPPORTUNITY EMPLOYER

1. 8:30 A.M. CLOSED SESSION

- 1.1 Conference with labor negotiators (Government Code 54957.6)
Agency Representative: Superintendent Jason Morse
Employee organizations: CEMUS and MTA bargaining units and unrepresented employees
- 1.2 Conference with labor negotiator (Government Code 54957.6)
Unrepresented employee: Superintendent

2. 9:00 A.M. OPEN SESSION

- 2.1. Call to order and roll call
- 2.2. Approval of agenda
Items to be removed from the agenda or changes to the agenda should be done at this time.

3. PARENT/COMMUNITY COMMENT

Under the requirements of the Brown Act and open meeting laws, members of the community wishing to address an item on the agenda may do so at this time or when the item comes before the Board. Items not on the agenda cannot be addressed at this time. A three-minute limit is set for each speaker on all items. The total time for public input on each item is limited to 20 minutes. (Government Code 54952). The Board may briefly respond to public comments by asking questions to clarify the speaker's comments and refer the speaker to the Superintendent for further clarification. We thank you for your comments and participation at this meeting.

4. INFORMATION/DISCUSSION/POSSIBLE ACTION ITEMS

- 4.1. Sexual Harassment Training
Loren Soukup of School and College Legal Services will conduct Sexual Harassment Training with the Board (discussion)
- 4.2. Board Self-Evaluation & Discussion of Norms
The Board will conduct a self-evaluation and discuss Board norms (discussion)

5. ADJOURNMENT

The next regular Board meeting is scheduled for **May 20, 2021** via Zoom.

CSBA Sample

Administrative Regulation

Sexual Harassment

AR 4119.11 4219.11, 4319.11

Personnel

Note: The following administrative regulation is mandated pursuant to Education Code 231.5 and includes reasonable steps for preventing the occurrence of discrimination and harassment as required pursuant to Government Code 12940 (California Fair Employment and Housing Act). The focus of this administrative regulation is on sexual harassment by and of employees. Pursuant to Government Code 12940 and 2 CCR 11009, interns, volunteers, and job applicants are entitled to the same protection against sexual harassment as applicable to employees.

Note: For information related to sexual harassment involving students, see BP/AR 5145.7 - Sexual Harassment and AR 5145.71 - Title IX Sexual Harassment Complaint Procedures.

The following administrative regulation shall apply to all allegations of sexual harassment involving employees, interns, volunteers, and job applicants, but shall not be used to resolve any complaint by or against a student.

Definitions

Note: Alleged conduct that meets the federal definition of sexual harassment in 34 CFR 106.30, as added by 85 Fed. Reg. 30026, requires investigation and resolution through Title IX regulations; see AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures. Pursuant to 34 CFR 106.30, sexual harassment includes (1) a district employee conditioning the provision of a district aid, benefit, or service on an individual's participation in unwelcome sexual conduct; (2) unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity; or (3) sexual assault, dating violence, domestic violence, or stalking as defined in 20 USC 1092 and 34 USC 12291)

Note: Education Code 212.5 defines sexual harassment as any unwelcome sexual advance, request for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone in the educational setting. Conduct that does not meet the definition of sexual harassment in 34 CFR 106.30 shall be investigated and resolved in accordance with AR 4030 - Nondiscrimination in Employment.

Note: In *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court held that same-sex sexual harassment could be actionable under Title VII of the Civil Rights Act of 1964 (42 USC 2000e-2000e-17).

Sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature, regardless of whether or not the conduct is motivated by sexual desire. Conduct is considered to be sexual harassment when made against another person of the same or opposite sex in the work or educational setting under any of the following conditions: (Education Code 212.5; Government Code 12940; 2 CCR 11034)

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual's employment.
2. Submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual.
3. The conduct has the purpose or effect of having a negative impact upon the individual's work performance or of creating an intimidating, hostile, or offensive work environment.
4. Submission to or rejection of the conduct is used as the basis for any decision affecting the individual regarding benefits, services, honors, programs, or activities available at or through the district.

(cf. 4030 - Nondiscrimination in Employment)

For purposes of applying the complaint procedures specified in Title IX of the Education Amendments of 1972, sexual harassment is defined as any of the following forms of conduct that occurs in an education program or activity in which a district school exercises substantial control over the context and respondent: (34 CFR 106.30, 106.44)

1. A district employee conditioning the provision of a district aid, benefit, or service on the person's participation in unwelcome sexual conduct
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity
3. Sexual assault, dating violence, domestic violence, or stalking as defined in 20 USC 1092 or 34 USC 12291

(cf. 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaints)

Examples of Sexual Harassment

***Note: Pursuant to Government Code 12940, the district may be held liable for sexual harassment committed against employees by clients, customers, or other third parties if the district knew, or should have known, of the harassment and failed to take immediate and appropriate corrective action to stop the harassment. The following paragraph clarifies that sexual harassment may include acts by supervisors, co-workers, or other parties and should be

modified to reflect district practice.***

Examples of actions that might constitute sexual harassment under state or federal law in accordance with the definitions above, in the work or educational setting, whether committed by a supervisor, a co-worker, or a non-employee, include, but are not limited to:

1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors
2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects
3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements

Title IX Coordinator/Compliance Officer

Note: Pursuant to 34 CFR 106.8, districts that receive federal financial assistance are mandated to designate an employee to ensure district compliance with Title IX of the Education Amendments of 1972 and its implementing regulations. The following paragraph specifies that the Title IX Coordinator will be the same person(s) designated to serve as the coordinator for nondiscrimination in employment pursuant to AR 4030 - Nondiscrimination in Employment. Districts may modify this policy to designate separate district employees to serve these functions.

The district designates the following individual(s) as the responsible employee(s) to coordinate its efforts to comply with Title IX of the Education Amendments of 1972 in accordance with AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures, as well as to oversee, investigate, and resolve sexual harassment complaints processed under AR 4030 - Nondiscrimination in Employment. The Title IX Coordinator(s) may be contacted at:

(title or position)

(address)

(telephone number)

(email)

Training

***Note: Government Code 12950.1, as amended by SB 778 (Ch. 215, Statutes of 2019),

requires districts with five or more employees to provide sexual harassment training and education to supervisory and nonsupervisory employees by January 1, 2021 (or two years after a training provided in 2019) and once every two years thereafter. As amended, Government Code 12950.1 requires that new nonsupervisory employees be provided the training within six months of hire, consistent with the requirement for all newly hired supervisors or employees promoted to a supervisory position. Compliance with this law does not insulate the district from any liability for harassment.***

Note: Governing Board members, as elected officials, are not usually considered "supervisors"; however, since Board members have the authority to hire, reward, or discipline the Superintendent and other employees, Board members may also be required to receive sexual harassment training. Districts should consult with legal counsel to ensure that the appropriate individuals receive training.

Every two years, the Superintendent or designee shall ensure that supervisory employees receive at least two hours, and nonsupervisory employees receive at least one hour, of classroom or other effective interactive training and education regarding sexual harassment. All newly hired employees and employees promoted to a supervisory position shall receive training within six months of their assumption of the new position. (Government Code 12950.1)

A supervisory employee is any employee having the authority, in the interest of the district, to hire, transfer, suspend, lay off, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, adjust their grievances, or effectively recommend such action, when the exercise of the authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Government Code 12926)

(cf. 4300 - Administrative and Supervisory Personnel)

Such training may be completed by employees individually or as part of a group presentation, may be completed in shorter segments as long as the applicable hourly requirement is met, and may be provided in conjunction with other training provided to the employees. The training shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. (Government Code 12950.1)

The district's sexual harassment training and education program shall include, but is not limited to, the following: (Government Code 12950.1; 2 CCR 11024)

1. Information and practical guidance regarding federal and state laws concerning the prohibition, prevention, and correction of sexual harassment
2. The types of conduct that constitute sexual harassment
3. Remedies available for victims in civil actions, and potential employer/individual exposure/liability
4. Strategies to prevent harassment in the workplace

5. Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware
6. Practical examples which illustrate sexual harassment, discrimination, and retaliation using training modalities such as role plays, case studies, and group discussions, based on factual scenarios taken from case law, news and media accounts, and hypotheticals based on workplace situations and other sources
7. The limited confidentiality of the complaint process
8. Resources for victims of unlawful harassment, such as to whom they should report any alleged harassment
9. Steps necessary to take appropriate remedial measures to correct harassing behavior, which includes the district's obligation to conduct an effective workplace investigation of a harassment complaint
10. What to do if the supervisor is personally accused of harassment
11. The essential elements of the district's anti-harassment policy, and how to use the policy if a harassment complaint is filed

Employees shall receive a copy of the district's sexual harassment policy and administrative regulations, which they shall read and acknowledge that they have received.

12. Information, including practical examples, of harassment based on gender identity, gender expression, and sexual orientation
13. Prevention of abusive conduct, including a review of the definition and elements of abusive conduct pursuant to Government Code 12950.1, the negative effects that abusive conduct has on the victim and other in the workplace, the detrimental consequences of this conduct on employee productivity and morale, and that a single act does not constitute abusive conduct unless the act is severe or egregious

The Superintendent or designee shall retain for at least two years the records of any training provided to supervisory employees. Such records shall include the names of trained employees, date of the training, the type of training, and the name of the training provider. (2 CCR 11024)

Notifications

The Superintendent or designee shall notify employees that the district does not discriminate on the basis of sex as required by Title IX, that the Title IX nondiscrimination requirement extends to employment, and that inquiries about the application of Title IX to the district may be referred to the district's Title IX Coordinator and/or to the Assistant Secretary for Civil Rights, U.S. Department of Education. (34 CFR 106.8)

(cf. 4112.9/4212.9/4312.9 - Employee Notifications)

The district shall notify employees, bargaining units, and applicants for employment of the name or title, office address, email address, and telephone number of the district's Title IX Coordinator. (34 CFR 106.8)

A copy of the Board policy and this administrative regulation shall:

1. Be displayed in a prominent location in the main administrative building, district office, or other area of the school where notices of district rules, regulations, procedures, and standards of conduct are posted (Education Code 231.5)
2. Be provided to every district employee at the beginning of the first quarter or semester of the school year or whenever a new employee is hired (Education Code 231.5)
3. Appear in any school or district publication that sets forth the school's or district's comprehensive rules, regulations, procedures, and standards of conduct (Education Code 231.5)
4. Be posted, along with the name or title and contact information of the Title IX Coordinator, in a prominent location on the district's web site (34 CFR 106.8)
5. Be included, along with the name or title and contact information of the Title IX Coordinator, in any handbook provided to employees or employee organizations (34 CFR 106.8)

Note: Government Code 12950 requires the Department of Fair Employment and Housing (DFEH) to develop an information sheet on employment discrimination and the illegality of sexual harassment and a poster regarding the rights of transgender employees. These documents are available on DFEH's web site.

All employees shall receive a copy of an information sheet prepared by the California Department of Fair Employment and Housing (DFEH) or the district that contains, at a minimum, components on: (Government Code 12950)

1. The illegality of sexual harassment
2. The definition of sexual harassment under applicable state and federal law
3. A description of sexual harassment, with examples
4. The district's complaint process available to the employee
5. The legal remedies and complaint process available through DFEH and the Equal Employment Opportunity Commission (EEOC)

6. Directions on how to contact DFEH and the EEOC

7. The protection against retaliation provided by 2 CCR 11021 for opposing harassment prohibited by law or for filing a complaint with or otherwise participating in an investigation, proceeding, or hearing conducted by DFEH and the EEOC

In addition, the district shall post, in a prominent and accessible location, the DFEH poster on discrimination in employment and the illegality of sexual harassment and the DFEH poster regarding transgender rights. (Government Code 12950)

Complaint Procedures

All complaints and allegations of sexual harassment by and against employees shall be investigated and resolved in accordance with law and district procedures. The Title IX Coordinator shall review the allegations to determine the applicable procedure for responding to the complaint. All complaints that meet the definition of sexual harassment under Title IX shall be investigated and resolved in accordance with AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures. Other sexual harassment complaints shall be investigated and resolved pursuant to AR 4030 - Nondiscrimination in Employment.

If sexual harassment is found following an investigation, the Title IX Coordinator, or designee in consultation with the Coordinator, shall take prompt action to stop the sexual harassment, prevent recurrence, and address any continuing effects.

(3/18 7/20) 10/20

CSBA Sample

Administrative Regulation

Title IX Sexual Harassment Complaint Procedures

AR 4119.12 4219.12,4319.12

Personnel

Note: Title IX of the Education Amendments of 1972 (20 USC 1681-1688; 34 CFR 106.1-106.82) prohibits discrimination based on sex, including sexual harassment, and mandates that the district adopt and publish complaint procedures.

Note: The following administrative regulation reflects the Title IX complaint procedure detailed in 34 CFR 106.44-106.45, as added by 85 Fed. Reg. 30026, which must be used, effective August 14, 2020, to address any complaint of sexual harassment that meets the definition in 34 CFR 106.30. Pursuant to 34 CFR 106.30, allegations of sexual harassment governed by these regulations include (1) a district employee conditioning the provision of a district aid, benefit, or service on an individual's participation in unwelcome sexual conduct; (2) unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity; or (3) sexual assault, dating violence, domestic violence, or stalking as defined in 20 USC 1092 and 34 USC 12291. Alleged sexual harassment in employment that does not meet this definition should be addressed through the district's complaint procedures described in AR 4030 - Nondiscrimination in Employment.

Note: 34 CFR 106.44 requires the district, when there is actual knowledge of sexual harassment, to respond promptly in a manner that is not deliberately indifferent. 34 CFR 106.30 defines "actual knowledge" as notice of sexual harassment or allegations of sexual harassment being submitted to the district's Title IX Coordinator, any official of the district who has authority to institute corrective measures, or any employee of an elementary or secondary school. A district is deliberately indifferent only if its response to Title IX sexual harassment is clearly unreasonable in light of the known circumstances.

Note: Application of the Title IX complaint procedures to the facts of a specific complaint may implicate complicated questions about the intersection of state law, federal law, and, in cases involving employees, the applicable collective bargaining agreement. Districts with questions about specific complaints are strongly encouraged to consult legal counsel.

Note: Also see BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment for information about prohibited conduct, training, required notifications, and processes for reporting sexual harassment.

The complaint procedures described in this administrative regulation shall be used to address any complaint governed by Title IX of the Education Amendments of 1972 alleging that a district employee, while in an education program or activity in which a district school exercises

substantial control over the context and respondent, was subjected to one or more of the following forms of sexual harassment: (34 CFR 106.30, 106.44)

1. A district employee conditioning the provision of a district aid, benefit, or service on a person's participation in unwelcome sexual conduct
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity
3. Sexual assault, dating violence, domestic violence, or stalking as defined in 20 USC 1092 or 34 USC 12291

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

All other sexual harassment complaints or allegations shall be investigated and resolved in accordance with AR 4030 - Nondiscrimination in Employment. The determination of whether the allegations meet the definition of sexual harassment under Title IX shall be made by the district's Title IX Coordinator.

(cf. 4030 - Nondiscrimination in Employment)

Because the complainant has a right to pursue a complaint under AR 4030 for any allegation that is dismissed or denied under the Title IX complaint procedure, the Title IX Coordinator shall ensure that all requirements and timelines for AR 4030 are concurrently met while implementing the Title IX procedure.

Reporting Allegations/Filing a Formal Complaint

Note: Pursuant to 34 CFR 106.30, the timeline for resolving a sexual harassment complaint begins when the district has actual knowledge of sexual harassment, defined as the receipt of a report by the Title IX Coordinator or other employee of an elementary or secondary school. The following paragraph reflects the requirement for any employee to forward the report to the Title IX Coordinator as stated in AR 4119.11/4219.11/4319.11 - Sexual Harassment and may be revised to reflect district practice.

An employee who is the alleged victim of sexual harassment may submit a report of sexual harassment to the district's Title IX Coordinator using the contact information listed in AR 4119.11/4219.11/4319.11 - Sexual Harassment or to the employee's direct supervisor or other district administrator, who shall forward the report to the Title IX Coordinator within one day of receiving the report.

Upon receiving such a report, the Title IX Coordinator shall inform the complainant of the right to file a formal complaint and the process for filing a formal complaint.

A formal complaint, with the complainant's physical or digital signature, may be filed with the

Title IX Coordinator in person, by mail, by email, or by any other method authorized by the district. (34 CFR 106.30)

Note: Given the district's duty pursuant to 34 CFR 106.44 to respond to reports of sexual harassment in a manner that is not deliberately indifferent, the Title IX Coordinator should file a complaint in certain situations even when the victim chooses not to do so, including, but not limited to, when a safety threat exists. In such cases, the Title IX Coordinator and the alleged victim are not named parties to the case, but the alleged victim must receive notices as required by the Title IX regulations at specific points in the complaint process.

Even if the alleged victim chooses not to file a formal complaint, the Title IX Coordinator shall file a formal complaint in situations when a safety threat exists. In addition, the Title IX Coordinator may file a formal complaint in other situations as permitted under the Title IX regulations, including as part of the district's obligation to not be deliberately indifferent to known allegations of sexual harassment. In such cases, the Title IX Coordinator shall provide the alleged victim notices as required by the Title IX regulations at specific points in the complaint process.

The Title IX Coordinator, investigator, decision-maker, or a facilitator of an informal resolution process shall not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Such persons shall receive training in accordance with 34 CFR 106.45. (34 CFR 106.45)

Supportive Measures

Upon receipt of a report of Title IX sexual harassment, the Title IX Coordinator shall promptly contact the complainant to discuss the availability of supportive measures and shall consider the complainant's wishes with respect to the supportive measures implemented. Supportive measures shall be offered as appropriate, as reasonably available, and without charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures shall be nondisciplinary, nonpunitive, and not unreasonably burden the other party, including measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment. Supportive measures may include, but are not limited to, counseling, extensions of deadlines, modifications of work schedules, mutual restrictions on contact, changes in work locations, leaves of absence, increased security, and monitoring of certain areas of the campus. (34 CFR 106.30, 106.44)

The district shall maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the district's ability to provide the supportive measures. (34 CFR 106.30)

Emergency Removal

If a district employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process. (34 CFR 106.44)

Note: Pursuant to Education Code 48900.2, a student in grades 4-12 may be suspended and/or expelled from school for sexual harassment. Districts should also note that Education Code 48915(c) requires the Superintendent or designee to recommend expulsion for any student, irrespective of grade, who commits sexual assault or battery as defined in the Penal Code. See AR 5144.1 - Suspension and Expulsion/Due Process.

Note: 34 CFR 106.44 allows a student to be removed in emergency situations as described below, but requires that a student should not be "disciplined" prior to a finding being made pursuant to the grievance process established by 34 CFR 106.45. Due to this inconsistency in state and federal law, districts are advised to consult legal counsel as to the manner of imposing an emergency removal.

If the respondent is a student, the district may, on an emergency basis, remove the student from the district's education program or activity, provided that the district conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student does not modify a student's rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973. (34 CFR 106.44)

Dismissal of Complaint

The Title IX Coordinator shall dismiss a formal complaint if the alleged conduct would not constitute sexual harassment as defined in 34 CFR 106.30 even if proved. The Title IX Coordinator shall also dismiss any complaint in which the alleged conduct did not occur in the district's education program or activity or did not occur against a person in the United States, and may dismiss a formal complaint if the complainant notifies the district in writing that the complainant would like to withdraw the complaint or any allegations in the complaint, the respondent is no longer employed by the district, or sufficient circumstances prevent the district from gathering evidence sufficient to reach a determination with regard to the complaint. (34 CFR 106.45)

Upon dismissal, the Title IX Coordinator shall promptly send written notice of the dismissal and the reasons for the dismissal simultaneously to the parties, and shall inform them of their right to appeal the dismissal of a formal complaint or any allegation in the complaint in accordance with the appeal procedures described in the section "Appeals" below. (34 CFR 106.45)

If a complaint is dismissed, the conduct may still be addressed pursuant to AR 4030 - Nondiscrimination in Employment as applicable.

Informal Resolution Process

When a formal complaint of sexual harassment is filed, the district may offer an informal resolution process, such as mediation, at any time prior to reaching a determination regarding responsibility. The district shall not require a party to participate in the informal resolution

process or to waive the right to an investigation and adjudication of a formal complaint. (34 CFR 106.45)

The district may facilitate an informal resolution process provided that the district: (34 CFR 106.45)

1. Provides the parties with written notice disclosing the allegations, the requirements of the informal resolution process, the right to withdraw from the informal process and resume the formal complaint process, and any consequences resulting from participating in the informal resolution process, including that records will be maintained or could be shared.

2. Obtains the parties' voluntary, written consent to the informal resolution process

Written Notice

If a formal complaint is filed, the Title IX Coordinator shall provide the known parties with written notice of the following: (34 CFR 106.45)

1. The district's complaint process, including any informal resolution process

2. The allegations potentially constituting sexual harassment with sufficient details known at the time, including the identity of parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident if known. Such notice shall be provided with sufficient time for the parties to prepare a response before any initial interview.

If, during the course of the investigation, new Title IX allegations arise about the complainant or respondent that are not included in the initial notice, the Title IX Coordinator shall provide notice of the additional allegations to the parties.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the complaint process

4. The opportunity for the parties to have an advisor of their choice who may be, but is not required to be, an attorney, and the ability to inspect and review evidence

5. The prohibition against knowingly making false statements or knowingly submitting false information during the complaint process

Note: The following paragraph is optional. Although not required by law, a best practice is to provide notice to the parties of the name of the investigator, facilitator, and decision-maker in order to give the parties an opportunity to raise concerns of conflict of interest or bias as prohibited by 34 CFR 106.45.

The above notice shall also include the name of the investigator, facilitator of an informal process, and decision-maker and shall inform the parties that, if at any time a party has concerns

regarding conflict of interest or bias regarding any of these persons, the party should immediately notify the Title IX Coordinator.

Investigation Procedures

Note: Pursuant to 34 CFR 106.45, when investigating a formal complaint, the burden of proof rests on the district and not on the parties. However, the district must obtain the party's voluntary, written consent to access, consider, disclose, or otherwise use a party's records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, which are made and maintained in connection with the provision of treatment to the party.

Note: 34 CFR 106.45 authorizes, but does not require, the district to conduct a live hearing at which each party's advisor may ask the other party and any witnesses all relevant questions and follow-up questions. If the district chooses to include such a hearing as a component of its complaint procedure, the following list should be modified to include requirements for the hearing in accordance with 34 CFR 106.45.

During the investigation process, the district's designated investigator shall: (34 CFR 106.45)

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
2. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
3. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney
4. Not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding, although the district may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties
5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all investigative interviews or other meetings, with sufficient time for the party to prepare to participate
6. Send in an electronic format or hard copy to both parties and their advisors, if any, the evidence obtained as part of the investigation that is directly related to the allegations raised in the complaint, and provide the parties at least 10 days to submit a written response for the investigator to consider prior to the completion of the investigative report
7. Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a

complainant, respondent, or witness

8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to the determination of responsibility, send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy, for their review and written response

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. (34 CFR 106.45)

Privacy rights of all parties to the complaint shall be maintained in accordance with applicable state and federal laws.

Note: Districts with questions about the application of a collective bargaining agreement in the context of a Title IX investigation should consult legal counsel.

If the complaint is against an employee, rights conferred under an applicable collective bargaining agreement shall be applied to the extent they do not conflict with the Title IX requirements.

Written Decision

Note: Pursuant to 34 CFR 106.45, the person designated as the decision-maker of the determination of responsibility cannot be the same person designated as the Title IX Coordinator, an investigator, or the person who considers appeals. The following paragraph may be revised to reflect the position designated by the district to provide a written determination of responsibility. While designation decisions will depend on the size of the district, a best practice is to designate an upper-level administrator as the decision-maker and designate the Superintendent as the person to consider appeals.

The Superintendent shall designate an employee as the decision-maker to determine responsibility for the alleged conduct, who shall not be the Title IX Coordinator or a person involved in the investigation of the matter. (34 CFR 106.45)

After the investigative report has been sent to the parties but before reaching a determination regarding responsibility, the decision-maker shall afford each party the opportunity to submit written, relevant questions that the party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

The decision-maker shall issue, and simultaneously provide to both parties, a written decision as to whether the respondent is responsible for the alleged conduct. (34 CFR 106.45)

***Note: 34 CFR 106.45 requires that the district's complaint process include a "reasonably prompt" timeframe for concluding the complaint process, but does not specify the number of

days within which the final decision must be issued. Districts may revise the following paragraph to include a different timeline as long as it would satisfy the requirement to act promptly.***

The written decision shall be issued within 60 calendar days of the receipt of the complaint.

The timeline may be temporarily extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the action. (34 CFR 106.45)

Note: 34 CFR 106.45 mandates that the district's complaint procedures state whether the district's determination of responsibility will be based on a "preponderance of evidence" standard or "clear and convincing evidence" standard. The following paragraph reflects the "preponderance of evidence" standard, which is a less stringent standard to prove misconduct, and should be revised if the district chooses to use a "clear and convincing evidence" standard. The standard selected by the district must be applied uniformly for all Title IX sexual harassment complaints. The district should consult with legal counsel in determining which standard to use.

In making this determination, the decision-maker shall use the "preponderance of the evidence" standard for all formal complaints of sexual harassment. (34 CFR 106.45)

The written decision shall include the following: (34 CFR 106.45)

1. Identification of the allegations potentially constituting sexual harassment as defined in 34 CFR 106.30
2. A description of the procedural steps taken from receipt of the formal complaint through the written decision, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if the district includes hearings as part of the grievance process
3. Findings of fact supporting the determination
4. Conclusions regarding the application of the district's code of conduct or policies to the facts
5. A statement of, and rationale for, the result as to each allegation, including a decision regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's educational program or activity will be provided by the district to the complainant
6. The district's procedures and permissible bases for the complainant and respondent to appeal

Appeals

Note: 34 CFR 106.45 allows either the complainant or respondent to appeal the district's decision. The district may revise the following section to reflect applicable timelines established by the district.

Note: The following section should also be revised to identify the person who has been designated as the decision-maker(s) for the appeal. Pursuant to 34 CFR 106.45, the decision-maker for the appeal cannot be the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.

Either party may appeal the district's decision or dismissal of a formal complaint or any allegation in the complaint, if the party believes that a procedural irregularity affected the outcome, new evidence is available that could affect the outcome, or a conflict of interest or bias by the Title IX Coordinator, investigator(s), or decision-maker(s) affected the outcome. If an appeal is filed, the district shall: (34 CFR 106.45)

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
2. Ensure that the decision-maker(s) for the appeal is trained in accordance with 34 CFR 106.45 and is not the same decision-maker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
4. Issue a written decision describing the result of the appeal and the rationale for the result
5. Provide the written decision simultaneously to both parties

An appeal must be filed in writing within 10 calendar days of receiving the notice of the decision or dismissal, stating the grounds for the appeal and including any relevant documentation in support of the appeal. Appeals submitted after this deadline are not timely and shall not be considered.

A written decision shall be provided to the parties within 20 calendar days from the receipt of the appeal.

Either party has the right to file a complaint with the U.S. Department of Education's Office for Civil Rights within 180 days of the date of the most recently alleged misconduct.

The complainant shall be advised of any civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders that may be available under state or federal antidiscrimination laws, if applicable.

Remedies

Note: 34 CFR 106.45 mandates that the district's Title IX complaint process list, or describe the range of possible remedies that the district may implement following any determination of responsibility. The following section may be revised to reflect district practice.

When a determination of responsibility for sexual harassment has been made against the respondent, the district shall provide remedies to the complainant. Such remedies may include the same individualized services described above in the section "Supportive Measures," but need not be nondisciplinary or nonpunitive and need not avoid burdening the respondent. (34 CFR 106.45)

Disciplinary Actions

The district shall not impose any disciplinary sanctions or other actions against a respondent, other than supportive measures as described above in the section "Supportive Measures," until the complaint procedure has been completed and a determination of responsibility has been made. (34 CFR 106.44)

When an employee is found to have committed sexual harassment or retaliation, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

(cf. 4117.7/4317.7 - Employment Status Report)
(cf. 4118 - Dismissal/Suspension/Disciplinary Action)
(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)
(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

Record-Keeping

The Superintendent or designee shall maintain, for a period of seven years: (34 CFR 106.45)

1. A record of all reported cases and Title IX investigations of sexual harassment, any determinations of responsibility, any audio or audiovisual recording and transcript if applicable, any disciplinary sanctions imposed, any remedies provided to the complainant, and any appeal or informal resolution and the results therefrom.
2. A record of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment, including the district's basis for its conclusion that its response was not deliberately indifferent, the measures taken that were designed to restore or preserve equal access to the education program or activity, and, if no supportive measures were provided to the complainant, the reasons that such a response was not unreasonable in light of the known circumstances.
3. All materials used to train the Title IX Coordinator, investigator(s), decision-maker(s), and any person who facilitates an informal resolution process. The district shall make such training materials publicly available on its web site, or if the district does not maintain a web site,

available upon request by members of the public.

(cf. 1113 - District and School Web Sites)

(cf. 3580 - District Records)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

48900 Grounds for suspension or expulsion

48900.2 Additional grounds for suspension or expulsion; sexual harassment

48985 Notices, report, statements and records in primary language

CIVIL CODE

51.9 Liability for sexual harassment; business, service and professional relationships

1714.1 Liability of parents/guardians for willful misconduct of minor

GOVERNMENT CODE

12950.1 Sexual harassment training

CODE OF REGULATIONS, TITLE 5

4600-4670 Uniform complaint procedures

4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1092 Definition of sexual assault

1221 Application of laws

1232g Family Educational Rights and Privacy Act

1681-1688 Title IX of the Education Amendments of 1972

UNITED STATES CODE, TITLE 34

12291 Definition of dating violence, domestic violence, and stalking

UNITED STATES CODE, TITLE 42

1983 Civil action for deprivation of rights

2000d-2000d-7 Title VI, Civil Rights Act of 1964

2000e-2000e-17 Title VII, Civil Rights Act of 1964 as amended

CODE OF FEDERAL REGULATIONS, TITLE 34

99.1-99.67 Family Educational Rights and Privacy

106.1-106.82 Nondiscrimination on the basis of sex in education programs

COURT DECISIONS

Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567

Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130

Reese v. Jefferson School District, (2000, 9th Cir.) 208 F.3d 736

Davis v. Monroe County Board of Education, (1999) 526 U.S. 629

Gebser v. Lago Vista Independent School District, (1998) 524 U.S. 274

Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473

Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

WEB SITES

CSBA: <http://www.csba.org>

California Department of Education: <http://www.cde.ca.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

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CSBA Sample

Board Policy

Sexual Harassment

BP 4119.11 4219.11, 4319.11

Personnel

Note: Education Code 231.5, 2 CCR 11023, and 34 CFR 106.8 mandate the district to have a written policy on sexual harassment. As part of this mandate, the district also should adopt a sexual harassment policy related to students; see BP/AR 5145.7 - Sexual Harassment and AR 5145.71 - Title IX Sexual Harassment Complaint Procedures.

Note: Sexual harassment is prohibited pursuant to Title VII of the Civil Rights Act of 1964 (42 USC 2000e-2000e-17) and/or Title IX of the Education Amendments of 1972 (20 USC 1681-1688; 34 CFR 106.1-106.82), as well as the California Fair Employment and Housing Act (Government Code 12900-12996). Whether a complaint of sexual harassment is addressed through federal Title IX complaint procedures adopted pursuant to 34 CFR 106.44-106.45, as added by 85 Fed. Reg. 30026, or procedures adopted pursuant to 2 CCR 11023 is dependent on whether the alleged conduct meets the more stringent federal definition of sexual harassment or the state definition. In order to meet the applicable timelines, in some instances it may be necessary to review a complaint under both procedures concurrently. See the accompanying administrative regulation, AR 4030 - Nondiscrimination in Employment, and AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures.

Note: Pursuant to 2 CCR 11034, the district may be liable for sexual harassment committed by a supervisor, coworker, or a third party. Pursuant to Government Code 12940, employers may also be held liable for sexual harassment committed against their workers by clients, customers, or other third parties if they knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.

The following policy shall apply to all district employees, interns, volunteers, contractors, job applicants, and other persons with an employment relationship with the district.

The Governing Board is committed to providing a safe work environment that is free of harassment and intimidation. The Board prohibits sexual harassment against district employees and retaliatory behavior or action against any person who complains, testifies, or otherwise participates in the complaint process established for the purpose of this policy.

(cf. 0410 - Nondiscrimination in District Programs and Activities)

(cf. 4030 - Nondiscrimination in Employment)

Note: Government Code 12940 clarifies that sexual harassment includes harassment based on sex, gender, pregnancy, childbirth, or related medical conditions.

Sexual harassment includes, but is not limited to, harassment that is based on the sex, gender, gender identity, gender expression, or sexual orientation of the victim and harassment based on pregnancy, childbirth, or related medical conditions.

Note: Federal and state courts have provided guidance that may help employers avoid liability or mitigate damages in sexual harassment cases. In *Department of Health Services v. Superior Court (McGinnis)*, the California Supreme Court outlined measures that may constitute mitigating factors in the assessment of damages, including establishing anti-harassment policies, communicating those policies to employees, consistently enforcing the policies, preserving the confidentiality of employees who report harassment, and preventing retaliation against reporting employees. The U.S. Supreme Court in *Burlington Industries v. Ellerth* held that, for certain claims under federal law, an employer may defend against sexual harassment claims by proving that (1) reasonable care was exercised to prevent and promptly correct any sexually harassing behavior, and (2) the employee (victim) failed to take advantage of the preventive and corrective opportunities provided by the employer.

Note: Pursuant to Government Code 12950.1, as amended by SB 778 (Ch. 215, Statutes of 2019), employers with five or more employees are required to provide sexual harassment training to supervisory and nonsupervisory employees. See the accompanying administrative regulation for timelines and training requirements.

Note: Items #1-4 below reflect the courts' guidance and Government Code 12950.1, and should be modified to reflect district practice.

The Superintendent or designee shall take all actions necessary to ensure the prevention, investigation, and correction of sexual harassment, including but not limited to:

1. Providing training to employees in accordance with law and administrative regulation
2. Publicizing and disseminating the district's sexual harassment policy to employees and others to whom the policy may apply
3. Ensuring prompt, thorough, fair, and equitable investigation of complaints
4. Taking timely and appropriate corrective/remedial action(s), which may require interim separation of the complainant and the alleged harasser and subsequent monitoring of developments

Note: The following optional paragraph reflects a recommendation of the U.S. Equal Employment Opportunity Commission's informal guidance *Promising Practices for Preventing Harassment* and may be revised to reflect district practice.

The Superintendent or designee shall periodically evaluate the effectiveness of the district's strategies to prevent and address harassment. Such evaluation may involve conducting regular anonymous employee surveys to assess whether harassment is occurring or is perceived to be tolerated, partnering with researchers or other agencies with the needed expertise to evaluate the

district's prevention strategies, and using any other effective tool for receiving feedback on systems and/or processes. As necessary, changes shall be made to the harassment policy, complaint procedures, or training.

Sexual Harassment Reports and Complaints

Note: 34 CFR 106.8, as amended by 85 Fed. Reg. 30026, requires the district to designate at least one employee to coordinate its responsibilities under Title IX, who must be referred to as the Title IX Coordinator. See the accompanying administrative regulation.

Note: 34 CFR 106.44, as added by 85 Fed. Reg. 30026, requires the district, when there is actual knowledge of sexual harassment, to respond promptly in a manner that is not unreasonable in light of the known circumstances and in compliance with Title IX regulations. 34 CFR 106.30, as added, defines "actual knowledge" as notice of sexual harassment or allegations of sexual harassment being submitted to the district's Title IX Coordinator, any official of the district who has authority to institute corrective measures, or any employee of an elementary or secondary school. For this reason, the district should train all employees regarding the reporting process.

Note: In *Faragher v. City of Boca Raton*, one of the factors relied on by the U.S. Supreme Court in finding liability for harassment by a supervisor was the failure of the policy to provide an assurance to its employees that harassing supervisors may be bypassed in registering complaints.

District employees who feel that they have been sexually harassed in the performance of their district responsibilities or who have knowledge of any incident of sexual harassment by or against another employee shall immediately report the incident to their direct supervisor, a district administrator, or the district's Title IX Coordinator. Employees may bypass their supervisor in filing a complaint if the supervisor is the subject of the complaint. A supervisor or administrator who receives a harassment complaint shall promptly notify the Title IX Coordinator.

Once notified, the Title IX Coordinator shall ensure the complaint or allegation is addressed through AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures or AR 4030 - Nondiscrimination in Employment, as applicable. Because a complaint or allegation that is dismissed or denied under the Title IX complaint procedure may still be subject to consideration under state law, the Title IX Coordinator shall ensure that any implementation of AR 4119.12/4219.12/4319.12 concurrently meets the requirements of AR 4030.

(cf. 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaints)

The Title IX Coordinator shall offer supportive measures to the complainant and respondent, as deemed appropriate under the circumstances.

***Note: In addition to district discipline imposed on employees who engage in sexual harassment, Government Code 12940 provides that such employees may be held personally

liable in a court of law for any damage to the victim(s).***

Upon investigation of a sexual harassment complaint, any district employee found to have engaged or participated in sexual harassment or to have aided, abetted, incited, compelled, or coerced another to commit sexual harassment in violation of this policy shall be subject to disciplinary action, up to and including dismissal, in accordance with law and the applicable collective bargaining agreement.

(cf. 4117.7/4317.7 - Employment Status Reports)
(cf. 4118 - Dismissal/Suspension/Disciplinary Action)
(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

GOVERNMENT CODE

12900-12996 Fair Employment and Housing Act, especially:

12940 Prohibited discrimination

12950 Sexual harassment; distribution of information

12950.1 Sexual harassment training

LABOR CODE

1101 Political activities of employees

1102.1 Discrimination: sexual orientation

CODE OF REGULATIONS, TITLE 2

11009 Employment discrimination

11021 Retaliation

11023 Harassment and discrimination prevention and correction

11024 Sexual harassment training and education

11034 Terms, conditions, and privileges of employment

CODE OF REGULATIONS, TITLE 5

4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1681-1688 Title IX of the Education Amendments of 1972

UNITED STATES CODE, TITLE 42

2000e-2000e-17 Title VII, Civil Rights Act of 1964, as amended

CODE OF FEDERAL REGULATIONS, TITLE 34

106.1-106.9 Nondiscrimination on the basis of sex in education programs or activities

106.51-106.82 Nondiscrimination on the basis of sex in employment in education programs or activities

COURT DECISIONS

Department of Health Services v. Superior Court of California, (2003) 31 Cal.4th 1026

Faragher v. City of Boca Raton, (1998) 118 S.Ct. 2275

Burlington Industries v. Ellreth, (1998) 118 S.Ct. 2257

Gebser v. Lago Vista Independent School District, (1998) 118 S.Ct. 1989

Oncala v. Sundowner Offshore Serv. Inc., (1998) 118 S.Ct. 998
Meritor Savings Bank, FSB v. Vinson et al., (1986) 447 U.S. 57

Management Resources:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLICATIONS

Promising Practices for Preventing Harassment, November 2017

WEB SITES

California Department of Fair Employment and Housing: <http://www.dfeh.ca.gov>

Equal Employment Opportunity Commission: <http://www.eeoc.gov>

U.S. Department of Education, Office for Civil Rights:

<http://www.ed.gov/about/offices/list/ocr/index.html>

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Chart of Risk Factors for Harassment and Responsive Strategies

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	<p>Historic lack of diversity in the workplace</p> <p>Currently only one minority in a work group (e.g., team, department, location)</p>	<p>Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others.</p> <p>Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.</p>	<p>Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity.</p> <p>Pay attention to relations among and within work groups.</p>
Workplaces where some employees do not conform to workplace norms	<p>"Rough and tumble" or single-sex-dominated workplace cultures</p> <p>Remarks, jokes, or banter that are crude, "raunchy," or demeaning</p>	<p>Employees may be viewed as weak or susceptible to abuse.</p> <p>Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.</p>	<p>Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership.</p> <p>Pay attention to relations among and within work groups.</p>
Cultural and language differences in the workplace	<p>Arrival of new employees with different cultures or nationalities</p> <p>Segregation of employees with different cultures or nationalities</p>	<p>Different cultural backgrounds may make employees less aware of laws and workplace norms.</p> <p>Employees who do not speak English may not know their rights and may be more subject to exploitation.</p> <p>Language and linguistic characteristics can play a role in harassment.</p>	<p>Ensure that culturally diverse employees understand laws, workplace norms, and policies.</p> <p>Increase diversity in culturally segregated workforces.</p> <p>Pay attention to relations among and within work groups.</p>
Coarsened Social Discourse Outside the Workplace	<p>Increasingly heated discussion of current events occurring outside the workplace</p>	<p>Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.</p>	<p>Proactively identify current events-national and local-that are likely to be discussed in the workplace.</p> <p>Remind the workforce of the types of conduct that are unacceptable in the workplace.</p>

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Young workforces	Significant number of teenage and young adult employees	<p>Employees in their first or second jobs may be less aware of laws and workplace norms.</p> <p>Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable.</p> <p>Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions.</p> <p>Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.</p>	<p>Provide targeted outreach about harassment in high schools and colleges.</p> <p>Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct.</p> <p>Provide training on how to be a good supervisor when youth are promoted to supervisory positions.</p>
Workplaces with "high value" employees	<p>Executives or senior managers</p> <p>Employees with high value (actual or perceived) to the employer, e.g., the "rainmaking" partner or the prized, grant-winning researcher</p>	<p>Management is often reluctant to jeopardize high value employee's economic value to the employer.</p> <p>High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.</p>	<p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).</p>
Workplaces with significant power disparities	<p>Low-ranking employees in organizational hierarchy</p> <p>Employees holding positions usually subject to the direction of others, e.g., administrative support staff, nurses, janitors, etc.</p> <p>Gendered power disparities (e.g., most of the low-ranking employees are female)</p>	<p>Supervisors feel emboldened to exploit low-ranking employees.</p> <p>Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies).</p> <p>Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.</p>	<p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>Pay attention to relations among and within work groups with significant power disparities.</p>
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
<p>Workplaces where work is monotonous or tasks are low-intensity</p>	<p>Employees are not actively engaged or "have time on their hands"</p> <p>Repetitive work</p>	<p>Harassing behavior may become a way to vent frustration or avoid boredom.</p>	<p>Consider varying or restructuring job duties or workload to reduce monotony or boredom.</p> <p>Pay attention to relations among and within work groups with monotonous or low-intensity tasks.</p>
<p>Isolated workplaces</p>	<p>Physically isolated workplaces</p> <p>Employees work alone or have few opportunities to interact with others</p>	<p>Harassers have easy access to their targets.</p> <p>There are no witnesses.</p>	<p>Consider restructuring work environments and schedules to eliminate isolated conditions.</p> <p>Ensure that workers in isolated work environments understand complaint procedures.</p> <p>Create opportunities for isolated workers to connect with each other (e.g., in person, on line) to share concerns.</p>
<p>Workplaces that tolerate or encourage alcohol consumption</p>	<p>Alcohol consumption during and around work hours.</p>	<p>Alcohol reduces social inhibitions and impairs judgment.</p>	<p>Train co-workers to intervene appropriately if they observe alcohol-induced misconduct.</p> <p>Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed.</p> <p>Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.</p>
<p>Decentralized workplaces</p>	<p>Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors</p>	<p>Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules.</p> <p>Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.</p>	<p>Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be.</p> <p>Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction</p> <p>Develop systems for employees in geographically diverse locations to connect and communicate.</p>

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.



U.S. Equal Employment Opportunity Commission

Checklists for Employers

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

- Leadership has allocated sufficient *resources* for a harassment prevention effort
- Leadership has allocated sufficient *staff time* for a harassment prevention effort
- Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

- A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- Regular *compliance trainings* for all employees so they can recognize prohibited forms of conduct and know how to use the reporting system

Regular *compliance trainings* for *mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace

The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews

The organization conducts *workplace civility training* and *bystander intervention training*

The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.



U.S. Equal Employment Opportunity Commission

Checklists for Employers

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

- An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- An easy-to-understand description of prohibited conduct, including examples
- A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
- A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors

- A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- Is written in clear, simple words, in all languages commonly used by members of the workforce

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.



Checklists for Employers

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- Employer representatives who take reports seriously
- A supportive environment where individuals feel safe to report harassing behavior to management
- Well-trained, objective, and neutral investigators
- Timely responses and investigations
- Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.



U.S. Equal Employment Opportunity Commission

Checklists for Employers

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
 - Supported at the highest levels
 - Repeated and reinforced on a regular basis
 - Provided to all employees at every level of the organization
 - Conducted by qualified, live, and interactive trainers
 - If live training is not feasible, designed to include active engagement by participants
 - Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
 - Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
 - Includes examples that are tailored to the specific workplace and the specific workforce
 - Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace

- Describes, in simple terms, the process for reporting harassment that is experienced or observed
- Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-line Supervisors
 - Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
 - Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
 - Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

SEXUAL HARASSMENT

FACT SHEET

DFEH



Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person's sexual orientation or gender identity.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT

1. **“Quid pro quo”** (Latin for “this for that”) sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.
2. **“Hostile work environment”** sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interferes with your work performance or creates an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. A single act of harassment may be sufficiently severe to be unlawful.

SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

1. Unwanted sexual advances
2. Offering employment benefits in exchange for sexual favors
3. Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
4. Derogatory comments, epithets, slurs, or jokes
5. Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
6. Physical touching or assault, as well as impeding or blocking movements

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within three years of the last act of harassment or retaliation.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney's fees and costs if it prevails in litigation. Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.

SEXUAL HARASSMENT

FACT SHEET



CIVIL REMEDIES

- **Damages for emotional distress from each employer or person in violation of the law**
- **Hiring or reinstatement**
- **Back pay or promotion**
- **Changes in the policies or practices of the employer**

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

- 1.** Distribute copies of this brochure or an alternative writing that complies with Government Code 12950. This pamphlet may be duplicated in any quantity.
- 2.** Post a copy of the Department's employment poster entitled "California Law Prohibits Workplace Discrimination and Harassment."
- 3.** Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. The policy must:
 - Be in writing.
 - List all protected groups under the 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. That 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 DFEH and the United States Equal Employment Opportunity Commission 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 (see 2 CCR 11024).

- 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.
- 4.** Distribute its 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 acknowledgement form for employees to sign and return.
 - Sending the policy via email 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 session.
 - Using any other method that ensures employees received and understand the policy.
 - 5.** If the employer's workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.
 - 6.** In addition, employers who do business in California and employ 5 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. Training must be provided within six months of assumption of employment. Employees must be trained during calendar year 2020, and, after January 1, 2021, training must be provided again every two years. Please see Gov. Code 12950.1 and 2 CCR 11024 for further information.

TO FILE A COMPLAINT

Department of Fair Employment and Housing

dfeh.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

**Sexual
Harassment/Hostile Work
Environment Training
May 5, 2021**

Presented by:

Loren W. Soukup, Senior Assistant General Counsel

School & College Legal Services of California

Sexual Harassment: An Overview

What is Sexual Harassment?

Sexual harassment has been defined as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Sexual harassment may include any of the following behaviors:

- Verbal harassment: May include epithets, derogatory comments or slurs (or repeated romantic overtures, sexual comments and jokes or prying into one’s personal affairs).
- Physical harassment: May include unwanted touching, rubbing against someone, assault and physical interference with movement or work.
- Visual harassment: May include derogatory cartoons, drawings or posters, or lewd gestures.

Applicable Laws

- Title VII of the Civil Rights Act of 1964 (Federal)
- Title IX of the Education Amendments of 1972 (Federal)
- Fair Employment and Housing Act (CA)
- Education Code (CA)

Title VII of the Federal Civil Rights Act of 1964

A federal law that prohibits employment discrimination based on gender, including sexual harassment



* Board members are not considered “employees” under Title VII

Title VII

Sexual Harassment

Unwelcome **sexual advances**, requests for **sexual favors**, and other **verbal or physical conduct of a sexual nature** constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a **term or condition of the individual's employment**, (2) submission to or rejection of such conduct ... is used as the basis for **employment decisions affecting such individual** or (3) such conduct has the purpose or effect of **unreasonably interfering with an individual's work performance** or creating an **intimidating, hostile, or offensive working environment**. (29 CFR §1604.11)

Title VII

Hostile Work Environment

- Hostile work environment is a theory under which a plaintiff can bring a sexual harassment claim. Hostile work environment sexual harassment is characterized as conduct that has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive environment.
- In order for a plaintiff to prevail on a hostile work environment sexual harassment claim, the plaintiff must prove the following elements:
 1. The employee belongs to a *protected group*;
 2. The employee was subjected to *unwelcome sexual harassment*;
 3. The harassment complained of was *based on sex*; and
 4. The harassment complained of affected a term or condition or privilege of employment in that it was *sufficiently severe or pervasive* to “alter the conditions of the victim’s employment and create an abusive working environment”
 5. From an *objective and subjective perspective*.

Title VII

Unwelcome Sexual Harassment

- ***Unwelcome Sexual Harassment:*** The complained of sexual harassment must be unwelcome. Examples of unwelcome advances, conduct, or comments that may create a hostile work environment include:
 - **Sexual advances or propositions:** Unwelcome sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment, even where an employee “voluntarily” engages in a sexual relationship out of fear of losing his/her job.
 - **Unwanted touching:** Even without express sexual propositions, a hostile environment claim may arise where an employee is subjected to unwanted touching, such as fondling or touching in an offensive manner.
 - **Leering:** A supervisor or coworker’s regular staring at a female employee’s breasts, for example, may give rise to a hostile environment claim.⁶⁶
 - **Verbal harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone’s appearance or body. ⁶⁷
 - **Nonsexual hostile conduct:** If hostile, but nonsexual conduct is directed at an employee because of her sex or gender, it may give rise to a hostile environment claim.

Title VII

Based on Sex

- ***Based on Sex:*** The harassment complained of must be based on the plaintiff's sex (i.e. the plaintiff's gender)
 - **Sex or gender does not need to be the sole reason:** A victim must show that sex or gender is a substantial motivating factor in the unwelcome conduct. However, there may be other motivating factors.
 - **Generally vulgar language is not necessarily “because of sex”:** The general use of vulgar gender-related language in the workplace, when not directed at plaintiff, is not necessarily “because of sex.”

Title VII

Sufficiently Severe or Pervasive

- ***Sufficiently Severe or Pervasive:*** The harassment must have been either so severe or pervasive, so as to alter the conditions of the victim's employment and create an abusive environment.
 - There is no bright line rule as to what specific conduct satisfies the threshold for severe or pervasive. However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive. Rather, the court will look at the totality of the circumstances to make this determination.
- In evaluating the totality of the circumstances, courts have looked at the following factors:
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee's work performance.

Title VII

Sufficiently Severe or Pervasive

- ***Objective and Subjective Perspective:*** The sexual harassment complained of must be sufficiently severe or pervasive both from an objective and a subjective perspective.
 - To satisfy the objective perspective standard, the reasonable person standard is employed by courts (i.e., would a reasonable person find the work environment hostile or abusive?).
 - In order to satisfy the subjective perspective standard, the plaintiff himself or herself must find the work environment hostile or abusive because of the sexual harassment.

Title VII

Quid Pro Quo

- Quid pro quo is an alternative theory under which a plaintiff can bring a sexual harassment claim. Quid pro quo sexual harassment is characterized as an employee's submission to conduct that is either (1) made a term or a condition of employment; or (2) forms a basis for employment decisions affecting that individual. Put another way, quid pro quo sexual harassment is "harassment that involves the conditioning of concrete employment benefits on sexual favors."

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62 (1986)

Title VII

Quid Pro Quo

- In order for a plaintiff to prevail on a quid pro quo sexual harassment claim under Title VII, the plaintiff must prove the following elements:
 1. The employee belonged to a protected group;
 2. The employee was subject to unwelcome sexual harassment;
 3. The harassment complained of was based on sex; and
 4. The employee's reaction to the unwelcome behavior affected *tangible aspects* of the employee's compensation, terms, conditions, or privileges of employment
- The first three requirements under this theory directly match those for a hostile work environment sexual harassment claim. However, the last requirement under this theory of sexual harassment is different.
- ***Tangible Aspects:*** The employee's reaction to the unwelcome behavior must have resulted in some tangible employment action. Thus, the supervisor's express or implied threat must be carried out

Title VII

When Is An Employer Liable?

Hostile Work Environment

- A hostile work environment sexual harassment claim presents a different liability scheme for employers based on the status of the harassing employee.
 - If the harassing employee is the plaintiff's **supervisor** (i.e., a person who has the authority to take tangible employment actions against the employee), the employer will be held vicariously liable for the sexual harassment. However, the employer can potentially assert an affirmative defense. The employer can only escape liability if it can prove: “(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”
 - If the harassing employee is a **co-worker** of the plaintiff, then the burden is on the plaintiff to prove that the employer was negligent in order for the employer to be held liable. To prove that the employer was negligent, the plaintiff must demonstrate that the employer knew or should have known of the harassment and subsequently failed to take prompt, effective, corrective action.

Title VII

When Is An Employer Liable?

Quid Pro Quo

- Under a quid pro quo sexual harassment claim, the employer is strictly liable for the conduct of supervisory employees that he or she has authority over hiring, advancement, dismissal and discipline under the common-law theory of respondeat superior.

Title VII

Exhaustion of Administrative Remedies/Statute of Limitations

- A plaintiff must file a charge with the EEOC prior to commencing a civil action in federal court. A plaintiff must first file a charge with the EEOC within either:
 - 180 calendar days after the alleged unlawful employment practice occurred; or
 - 300 calendar days after the alleged unlawful employment practice occurred, if plaintiff institutes proceedings “with a state or local agency with authority to grant or seek relief from such practice.”
- The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within 90 days.

Title IX of the Education Amendments of 1972

- A federal law that prohibits sex discrimination (including sexual harassment) in education programs or activities that receive federal funds
- Enforced by the U.S. Department of Education, Office for Civil Rights (OCR)
- Board members can file a Title IX Complaint



Title IX: Education Amendments Act of 1972 (20 U.S.C. 1681)

- Effective 8/14/20, the new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:
 1. Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
 2. Quid pro quo harassment; or
 3. Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

Title IX

Elements of the Cause of Action for Sexual Harassment under Title IX:

1. The school exercised *substantial control* over both the harasser and the context in which the harassment occurred.
2. The plaintiff suffered assault that is so *severe, pervasive, and objectively offensive* that it can be said to *deprive the plaintiff of access* to the educational opportunities or benefits provided by the school.
3. The harassment was committed on the basis of sex.
4. The school had *actual knowledge* of the harassment.
5. The school responded with *deliberate indifference*.
6. The school's deliberate indifference must have subjected the plaintiff to further harassment or made the plaintiff liable or vulnerable to it.

Title IX

- ***Substantial Control:*** The harasser must have been under the school's disciplinary authority. The assault must have occurred during school hours and on school grounds.
- ***Severe, Pervasive, and Objectively Offensive:*** Conduct under Title IX must be so severe, pervasive, and objectively offensive that it deprives the plaintiff of access to educational opportunities or benefits provided by the school.
 - A single occurrence of sexual assault may satisfy this requirement where “sufficiently serious” or particularly severe.
 - To show deprivation of access, it is not necessary to show that a victim was physically excluded from educational opportunities or benefits. Sufficient examples may include demonstrating dropping grades, being diagnosed with behavioral and/or anxiety disorders, becoming homebound or hospitalized due to harassment, physical violence, or sexual assault.

Title IX

- ***Actual Knowledge:*** An institution can be held liable under Title IX only where it had actual knowledge of the harassment. An appropriate school official, who had authority to take remedial measures, must have had knowledge of the harassment. The official must respond to the misconduct “in a manner that is not clearly unreasonable.”
- ***Deliberate Indifference:*** Plaintiff must prove that the school district’s response amounted to deliberate indifference. A school district is deemed to act with deliberate indifference when, after notice of the sexual harassment, either its actions are grossly inadequate or it does not take any action at all, and through its inadequate action or its lack of action, it effectively causes the student damage.
 - A plaintiff must show that the school district’s response was deficient, rather than merely negligent, lazy, or careless.

Title IX

Statute of Limitations

- Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions. In California, a person must file a Title IX lawsuit within 2 years of a discriminatory act.
- Note: Unlike claims brought under Title VII, Title IX has no requirement that a claim first be brought before an administrative agency before a lawsuit can be filed.

California Fair Employment and Housing Act (FEHA)

- In California, the Fair Employment and Housing Act (FEHA) makes it unlawful for any employer to harass an employee or job applicant because of sex. Harassment because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy or childbirth. (Government Code 12940)

California Fair Employment and Housing Act (FEHA)

- Employers have a duty to take “all reasonable steps necessary to prevent harassment from occurring” (Government Code § 12940(j)(1))
- See the Department of Fair Employment and Housing brochure

District Liability Under FEHA

- District is liable to employee, student or third party if the District...
 1. Knows or should have known of harassment, and
 2. Fails to take effective measures to stop it.
- Strict liability for harassment by a supervisor

FEHA vs. Title VII

- Where FEHA and Title VII are similar, California looks to Title VII federal case law to interpret FEHA.
- FEHA is more expansive than Title VII in important respects.
 - FEHA specifically prohibits sexual harassment and retaliation, not just sex-based discrimination.
 - FEHA applies to all employers, regardless of number of employees.
 - FEHA protects independent contractors, unpaid interns, and volunteers.

FEHA

Hostile Work Environment

- As under Title VII, an employee may have a claim for sexual harassment under a “hostile work environment” theory if he/she encounters sexual conduct in the workplace that interferes with his/her work performance or creates an intimidating, hostile, or offensive working environment. The elements of the cause of action mirror the Title VII elements:
 1. The employee is a member of a *protected category*.
 2. The employee was subjected to *unwelcome sexual advances, conduct, or comments*.
 3. The unwelcome conduct complained of was *because of the employee’s sex*.
 4. The conduct was *sufficiently severe or pervasive* to alter the conditions of plaintiff’s employment and create a hostile or abusive work environment.

FEHA

Hostile Work Environment

Like Title VII, FEHA prohibits discrimination and harassment against individuals based on a protected category. These categories include sex, gender, gender identity, gender expression, and sexual orientation, as well as race, color, religion, national origin, age, etc.

FEHA

Hostile Work Environment

- **Unwelcome sexual advances, conduct, or comments:** The same types of behavior may constitute unwelcome advances, conduct, or comments under either FEHA or Title VII. These behaviors may include, but are not limited to:
 - **Sexual Advances or Propositions:** Sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment.
 - **Unwanted Touching:** This may include intentional and repeated rubbing up against another's body or touching her in an offensive manner.
 - **Verbal Harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone's appearance or body.
 - **Nonsexual Hostile Conduct:** This refers to hostile conduct that is not sexual in nature, but that is directed at an employee because of her sex or gender.

FEHA

Hostile Work Environment

- ***Because of employee's sex:*** The harassment complained of must be based on the plaintiff's sex (i.e. the plaintiff's gender).
 - **Sex/gender does not need to be the sole reason:** As with Title VII claims, the unwelcome conduct may be motivated by factors other than sex or gender.
 - **Generally vulgar language is not necessarily “because of sex”:** As under federal law, the general use of vulgar gender-related language in the workplace, when not directed at plaintiff, is not necessarily “because of sex.”
 - **“Because of sex” applies to any gender.** Harassment because of sex is not limited to women.

FEHA

Hostile Work Environment

- ***Sufficiently Severe or Pervasive:*** California courts adopt the definitions of “severe” and “pervasive” developed under Title VII. The harassment must have been either so severe or so pervasive, so as to alter the conditions of the victim’s employment and create an abusive environment.
 - There is no bright line rule as to what specific conduct satisfies the threshold for severe or pervasive. However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive. Rather, the court will look at the totality of the circumstances to make this determination.

FEHA

Hostile Work Environment

- In evaluating the totality of the circumstances, courts have looked at the following factors:
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee's work performance.
- As under Title VII, it is not enough that the victim perceives the sexual conduct as severe or pervasive. The objective severity of harassment must also be determined from the perspective of a reasonable person in the victim's position.

FEHA

Quid Pro Quo Harassment

- Elements of the Cause of Action for Quid Pro Quo Harassment:
 - California adopts Title VII case law for quid pro quo harassment claims, and the elements of the cause of action are equivalent to Title VII's:
 1. The employee is a member of a protected group.
 2. The employee is subjected to unwelcome sexual advances, conduct, or comments.
 3. The unwelcome conduct complained of was because of employee's sex.
 4. The employee's reaction to the sexual conduct affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.
- Example:
 - Supervisor proposed to his employee that they have an extramarital affair, telling her that if she consented she could have any job she wanted when the company was reorganized

FEHA

When Is An Employer Liable?

- “[E]mployer” means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.
- It is an unlawful employment practice ... [f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.(Government Code 12940)
- As under Title VII, an employer can escape liability for some damages if it took reasonable steps to prevent workplace harassment and the employee unreasonably failed to use preventive and corrective measures that the employer provided, if those measures would have prevented any of the employee’s harm.

FEHA

When Is An Employer Liable?

- ***Supervisory Harassment:*** As under Title VII, when an employee is harassed by his/her supervisor, the employer can be held strictly liable, even if the employer was unaware of the harassment.
 - The FEHA definition of “supervisor” is broader than under Title VII and includes anyone whom the employer gives authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances.
 - An employer is not liable for a supervisor’s harassment when it occurs outside the scope of employment. However, the employer may be liable for harassment that takes place outside working hours if (a) it expressly or implicitly endorsed the conduct, and (b) the conduct was a customary incident of the employment relationship.

FEHA

When Is An Employer Liable?

- ***Coworker Harassment:*** California law provides that when an employee is harassed by an employee who is not her supervisor, her employer can only be held liable if:
 1. The employer knew (or should have known) of the harassing conduct, and
 2. The employer failed to take immediate and corrective action.
- ***Harassment by a Non-Employee:*** The same standard may apply when an employee is harassed in the workplace by a non-employee, such as a client or customer, if the employer (1) knew or should have known of the harassment and (2) failed to take immediate corrective action.

FEHA

Statute of Limitations

- A complaint under the FEHA must be filed with the Department of Fair Employment and Housing (DFEH) within one year of the last act of harassment

California Education Code

- “It is the policy of the State of California ... that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state” (Education Code § 231.5)
- Sexual harassment is prohibited as a form of sexual discrimination
- Enforcement of Ed Code complaints is through Board Policy – See BP/AR 4119.11 & AR 4119.12

Cal. Education Code § 220

“No person shall be subjected to discrimination on the basis of disability, **gender, gender identity, gender expression**, nationality, race or ethnicity, religion, **sexual orientation**, or any other characteristic contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid”

Cal. Education Code § 201

“Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.”

How Sexual Harassment is Reported

True or False?

In California, if the employee does not take advantage of the established internal complaint process, the employer has a complete defense to an action for sexual harassment.

FALSE

How Sexual Harassment is Reported

- A complainant can:
 - Follow the procedure in District policies – See BP/AR 4119.11 & AR 4119.12
 - Report directly to DFEH or EEOC (or OCR)
- Supervisors should take action if they:
 - Actually know about sexual harassment, or
 - Reasonably believe that sexual harassment is occurring

Who May Receive a Report of Sexual Harassment?

- Immediate supervisor
- Coordinator for Nondiscrimination in Employment or similar position
- Superintendent or designee
- Human resources or personnel department
- Board members
- Department of Fair Employment and Housing
- Equal Employment Opportunity Commission
- U.S. Department of Education Office for Civil Rights

Union Issues

- Is the employee engaging in protected union activity?
 - Employees have a protected right to engage in union activity during nonworking time. (*State of California (Employment Development Department)* (1999) PERB Decision No. 1365Sa.)
 - PERB has explained that “time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property.” (*Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, internal quotations and citation omitted.)
 - During non duty time, including meal or rest breaks, “solicitation and the distribution of literature as well as other nondisruptive concerted activities ... are statutorily protected. [Citation.]” (*Fresno Co. Superior Court* (2017) PERB Decision No. 2517C.)
 - PERB has held that employees have the right to communicate with each other at work concerning their terms and conditions of employment during nonwork time in nonwork areas. This right may only be restricted when the employer demonstrates that the restriction is necessary to maintain order, production, or discipline. (*Fresno Co. Superior Court* (2017) PERB Decision No. 2517C.)

Union Issues

- Does the Union activity require the involvement of the District/Board?
 - The union is prohibited from preventing the District from complying with its legally mandated sexual harassment complaint procedures.
 - The union cannot coerce or prevent unit members from not participating in/complying with the complaint procedures.

Remedies Available for Sexual Harassment

Victim Remedies

- Entitled to be “made whole” – that is the condition he/she would have been in but for the discriminatory conduct
- This could include back pay, reinstatement to a position or assignment, reinstate sick time or vacation time that the victim used because of the harassment, payment for emotional distress, and if lawsuit is involved – payment of attorneys fees, expert witness fees and court costs

Consequences to the Harasser

- Discipline, up to and including discharge
- Can be held personally liable – responsible for damages. Insurance would not cover this.
- Criminal penalties may apply if the harasser’s actions constitute criminal conduct

Best Practices From EEOC

- The U.S. Equal Employment Opportunity Commission has identified five core principles that have generally proven effective in preventing and addressing harassment:
 - Committed and engaged leadership;
 - Consistent and demonstrated accountability;
 - Strong and comprehensive harassment policies;
 - Trusted and accessible complaint procedures; and
 - Regular, interactive training tailored to the audience and the organization.

Best Practices From EEOC

EEOC has created checklists for employers to assist them with the implementation of its Promising Practices:

- <https://www.eeoc.gov/checklists-and-chart-risk-factors-employers>
- See attached checklists:
 - Checklist One: Leadership and Accountability
 - Checklist Two: An Anti-Harassment Policy
 - Checklist Three: A Harassment Reporting System and Investigations
 - Checklist Four: Compliance Training
 - Chart of Risk Factors and Responsive Strategies

Additional Resources

- California Department of Fair Employment and Housing,
www.dfeh.ca.gov
- U.S. Equal Employment Opportunity Commission,
www.eeoc.gov
- U.S. Department of Education Office of Civil Rights,
www.ed.gov/ocr
- California Community Colleges Chancellor's office,
www.cccco.edu

Questions?



Information in this presentation, including but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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