

# Sexual Harassment and Assault in the Workplace

## Changes in Law Should Focus on Perpetrators

### Summary

At both the state and federal levels, the issue of sexual harassment and sexual assault in the workplace is an ongoing discussion and debate. Legislators, high-profile film producers, actors, and other public figures are being identified as having engaged in inappropriate sexual conduct or harassment. The California Legislature has already held hearings on the issue and the California Women's Caucus has already issued its "Capitol Culture Change Goals." There is no question that California legislators will introduce legislation in 2018 to strengthen the already-existing laws that are designed to prevent and remedy harassment in the workplace, as well as workplace assaults.

### Fair Employment and Housing Act/Department of Fair Employment and Housing

California Government Code Section 12940(j)(1) of the Fair Employment and Housing Act (FEHA) provides in pertinent part:

*For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. [Emphasis added]*

FEHA defines an employer in Government Code Section 12926(d) as "any person regularly employing five or more persons, 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," but does not include a religious association or corporation not organized for private profit. [Emphasis added]

Harassment is defined to include verbal harassment, such as epithets, derogatory comments, or slurs; physical harassment, such as assault or physical interference with movement or work; and visual harassment, such as derogatory cartoons, drawings, or posters. Sexual harassment can include asking for sexual favors, sexual touching, or offensive language. Title 2, California Code of Regulations, Section 11019(b).

Unlawful harassment generally falls into two categories: quid pro quo or hostile work environment. Quid pro quo typically occurs when a person who has the power to influence an employment decision or condition seeks a sexual favor in return for that employment decision/condition. For example, quid pro quo could include a supervisor who requests an employee to engage in sexual contact in exchange for a bonus, continued employment, or even an approved request for time off.

Hostile work environment is sometimes more difficult to identify. Generally, the conduct at issue must be sufficiently "severe and pervasive" from a "reasonable person" perspective to be considered harassment. For example, if a co-worker asks another employee out for a date, and the employee declines, such conduct is isolated, and not severe or pervasive enough to be considered harassment. However, if the same individual continues to repeatedly ask the co-worker out on a date, despite prior rejections, this could lead to a hostile work environment. Additionally, a single incident between two people may be egregious enough to create a hostile work environment, such as a physical assault. See *Myers v. Trendwest Resorts, Inc.*, 148 CalApp.4th 1403 (2007).

Employers generally are liable for harassment that occurs on work premises or in connection with an employment relationship. If a supervisor engages in sexual harassment of a subordinate, an employer is strictly liable. If harassment occurs between two co-workers, an employer is liable if it knew or should have known about the conduct and failed to take immediate and appropriate corrective action.

Employers with 50 or more employees are required to provide sexual harassment prevention training to all supervisors in California every two years. Employers also are required to inform employees about their protections from harassment in the workplace and post information about the employer's internal complaint process to handle harassment complaints, as well as the ability for the employee or individual to file a complaint with the Department of Fair Employment and Housing (DFEH).

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The DFEH investigates all harassment complaints it receives, or the complainant can opt out of that agency investigation and request an immediate right-to-sue notice to pursue a claim in civil court. As set forth in the DFEH's *2016 Annual Report*, out of 3,590 employment complaints, there were approximately 554 allegations of sexual harassment.

### Division of Workers' Compensation

Under California law, injuries sustained by employees "arising out of and in the course of the employment" are governed exclusively by the workers' compensation law. Labor Code Section 3600(a). This exclusivity is based on the "compensation bargain" in which employers assume liability for injuries arising in the course of employment without regard to fault in exchange for limiting the liability to the workers' compensation arena.

As stated above, in Government Code Section 12940, subdivisions (a) and (j), FEHA prohibits discrimination and harassment in the workplace due to sex. Courts have found that emotional distress damages stemming from sexual harassment and sexual assault are not reasonably encompassed in the compensation bargain. In other words, harassment is not a normal part of employment. Thus, the exclusivity of workers' compensation does not apply to sexual harassment and sexual assault conduct that forms the basis for a FEHA claim. See *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97–98.

### Occupational Safety and Health Act and Cal/OSHA

The Division of Occupational Safety and Health, better known as Cal/OSHA, protects and improves health and safety in the workplace for working men and women in California. Cal/OSHA regulations require employers to develop policies and procedures to protect employees from foreseeable risks in the workplace—generally those that the employer knows about or should know about because of history of incidents, their industry or other factors.

Cal/OSHA does not distinguish between violence and sexual assault; sexual assault is a type of violence, which is covered under the Violence Prevention in Health Care regulation (Title 8, California Code of Regulations, Section 3342). A workplace violence prevention regulation for all industries is under development. At this time, employers with foreseeable risk are required to address the risk in their Injury and Illness Prevention Program with policies to prevent such incidents from occurring. In general, Cal/OSHA does not have regulatory jurisdiction regarding sexual assault in the workplace, other than in health care under Section 3342.

### Legislative Activity

Although as of the date of this publication no legislation on the issue has been introduced, various legislators have said they will introduce bills on the topic. Senator Connie Leyva (D-Chino) has announced that she will introduce legislation to ban confidential settlement agreements that include allegations of sexual assault or harassment. Assemblymember Lorena Gonzalez Fletcher (D-San Diego) has announced she will introduce legislation dealing with sexual harassment in the service industries.

On November 16, 2017, the Women's Caucus issued its Capitol Culture Change Goals, which are as follows:

- **Ensure Victims' Needs Are Met:** Connect/expand services for victims so their immediate needs are met;
- **Hold Perpetrators Accountable:** All allegations will receive a fair, unbiased and transparent investigation;
- **Create a Safe Reporting System:** Victims and witnesses must feel safe coming forward and have confidence that retaliation will not be permitted;
- **Establish Guiding Principles:** Change the Capitol culture through a unified, bicameral and bipartisan solution by creating an environment free of assault and harassment of any kind. Collaborate with all partners to ensure we meet our collective goals.

### CalChamber Position

Sexual harassment and sexual assault in the workplace are unacceptable and should be prohibited. California employers already have an incentive to eliminate workplace harassment or assault to protect their employees and avoid legal liability. Any additional changes or additions to laws in this area should focus on the perpetrator and how to preclude such conduct from occurring in the first place.

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