

How to Win Harassment, Discrimination & Punitive Damage Claims

Without an HR Expert

By¹

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#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, CA

Presenting an HR expert at trial to testify as to the standard of care is a well-established method for proving a claim that the employer failed to take reasonable steps to prevent, stop, and remedy harassment, discrimination, or retaliation.

Typically, this duty on the part of the employer is an integral part of a discrimination, harassment or retaliation case in chief. Some districts require a showing of negligence in order for an employer to be held liable for supervisor and/or coworker misconduct. Negligence can be demonstrated by showing that the employer failed to take reasonable steps to prevent, stop or correct misconduct in the workplace.² Other districts require the plaintiff to show that the employer knew or should have known of the misconduct, and failed to take prompt and appropriate corrective action.³ Further, a showing that the employer failed to comply with this duty may provide the basis for punitive damages under federal law and some state laws.⁴ In

¹ With special thanks to my editor, Amy Oppenheimer, Esq. (<http://amyopp.com>)

²For example, employers have been found liable where they had notice of prior acts of harassment by the same actor, but failed to take appropriate remedial action at any time. See, *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008) (because plaintiff's harasser was a known serial harasser, the employer is liable if its response to the other female employees' complaints demonstrates an attitude of permissiveness and was not reasonably calculated to end the harasser's pattern of harassment).

³ *E.E.O.C. v. Harbert- Yeargin, Inc.*, 266 F.3d 498, 518 (6th Cir. 2001).

⁴ See, *Bowles v Osmose Utility Service, Inc.* (8th Cir. 2006) 443 F.3d 671: doing nothing more than getting a denial from the alleged perpetrator may be the basis for punitive damages in race harassment case; *Tayborn v. City and County of San Francisco* (9th Cir. 2003) 341 F.3d 957: failure to interview all relevant witnesses may by itself be sufficient to establish the failure to take adequate remedial measures; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 126: Whatever [remedial] course of action the employer chooses to take, an effective remedy is unlikely to take shape in the absence of a thorough investigation of the alleged acts of harassment; *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 810-811: \$1 million punitive award upheld where employer's asserted defense that it had developed anti-harassment policies failed where those policies were not enforced.

California, a plaintiff can bring a separate cause of action for the employer's failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring.⁵

In addition, the EEOC's Guidelines encourage employers to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.⁶

The duty may also play a part in the defense of the case. Under Title VII, in a supervisor harassment case where there is no tangible harm, should an employer prove that it complied with this duty, it will have satisfied the first prong of an affirmative defense which will defeat plaintiff's entire claim.⁷ In a California Fair Employment & Housing Act ("FEHA") case, the employer may be able to reduce the amount of damages by showing that it took reasonable steps to prevent harassment but that the employee failed to take advantage of its prevention policies, without reasonable justification.⁸

So clearly, either as part of a claim or a defense, the duty to prevent, stop and correct discrimination, harassment or retaliation may be relevant. And the most effective way for either side to prove their position is to present an expert witness on HR best practices on how to comply with the duty. However, not every case warrants the expense of an HR expert, and in other cases, a judge might erroneously exclude the expert.⁹

This paper will set forth the HR best practices on how to comply with the employer's duty to prevent, stop and remedy discrimination, harassment and retaliation in the workplace. Inasmuch as the legal resources for these best practices have been more fully articulated in the harassment field, much of the references will be to harassment guidelines, regulations, statutes, and other EEO policies and procedures. It has been generally accepted that the same criteria apply to discrimination and retaliation cases.

⁵ Calif. Government Code §12940(k); But see, 2 California Code of Regulations §11023(a)(2) (as amended to conform to case law, 4/1/2016): this is not a stand-alone cause of action. In order to prevail on this separate claim, the plaintiff must prove the underlying claim of discrimination or harassment. *Trujillo v. No. County Transit Dist.* (1998) 63 Cal.App.4th 280, 289. The DFEH, however, may independently seek non-monetary preventative remedies for a violation, regardless of whether it prevails on the underlying claim. 2 CCR § 11023(a)(3) (2016). All references to 2 CCR §§ 11023 or 11024 will be to the newly amended regulations (4/1/2016).

⁶ EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at <https://www.eeoc.gov/policy/docs/currentissues.html>. The EEOC Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2405 (1986).

⁷ *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 753, 118 S. Ct. 2257; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S.Ct. 2275.

⁸ *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042, 6 Cal.Rptr.3d 441, 79 P.3d 556.

⁹ The topic of the admissibility of expert witness testimony on this issue is a subject too lengthy to address in this paper. For a good resource on the admissibility of such testimony, see "Expert Testimony on Investigations by the Experts," by Nancy Bornn and Michael A. Robbins (AWI Quarterly, Vol 3, No. 2, April 2012); "Why, How, and What Now, Getting Your Expert Testimony Admitted," by Michael A. Robbins and Julie Yanow (Bender, Cal. L&E Law Bulletin, Nov/Dec. 2008), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2015/november/annual/papers/100.authcheckdam.pdf

Finally, this paper will also set forth the minimum steps required by California employers to carry out this duty under the California FEHA statutes and the newly amended California Fair Employment and Housing Council (“FECH”) regulations. (Cal. Govt. Code §§ 12950 and 12950.1; 2 CCR §§ 11023 and 11024 (April 1, 2016).) Other jurisdictions may have similar state laws and regulations pertaining to the duty to prevent, stop, and correct wrongdoing. The reader is encouraged to research this issue in his/her own jurisdiction and to use such laws, if any, in the same manner as will be demonstrated in the mock cross-examinations of the employer’s HR personnel.

Under federal law, whether or not an employer can prove that it exercised reasonable care in carrying out this duty depends on the particular factual circumstances and, in some cases, the nature of the employer’s workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.¹⁰ California state law is in accord with this federal guideline. “A determination as to whether an employer has complied with its duty includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.”¹¹ The test is whether the steps that were taken were sufficient to have created a reasonable mechanism to prevent, stop and correct the wrongdoing.¹²

Here are the six topics an employer should address in order to satisfy its obligation to prevent, stop and remedy discrimination or harassment in the workplace:

- 1) creating, communicating and implementing written discrimination, harassment and retaliation prevention policies,
- 2) training supervisors,
- 3) educating all employees,
- 4) developing and implementing effective complaint procedures,
- 5) conducting proper investigations, and
- 6) taking appropriate remedial actions.¹³

The following table sets out the six topics, with the best practice steps an employer should take to adequately address them. It can be used as a checklist to compare what should have been done with what actions the employer actually took. The outline can be used as a template for the

¹⁰ EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999, 2010), p. 11, available at <https://www.eeoc.gov/policy/docs/harassment.pdf>

¹¹ 2 CCR § 11023(a)(1) (2016)

¹² *Holly D. v. Caltech*, 339 F.3d 1158, 1177 (9th Cir. 2003)

¹³ See, EEOC Enforcement Guidance, *supra*, at pp. 10-19; See, also, “Preventing Unlawful Workplace Harassment in California,” SHRM 2014.- Templates & Samples, available at <https://www.shrm.org/TemplatesTools/Toolkits/pages/californiapreventingunlawfulworkplaceharassment.aspx>

deposition of the employer's HR personnel, as the basis for special jury instructions, and/or as a checklist for your own HR expert. The panelists will provide demonstrations of how to use this checklist in cross-examination of the defendant's HR personnel or its designated "person most knowledgeable" (PMK) on the issue of compliance with this duty.

<u>STANDARD HR PRACTICES AND PROCEDURES REGARDING AN EMPLOYER'S DUTY TO PREVENT, STOP AND REMEDY HARASSMENT, DISCRIMINATION AND RETALIATION</u>	
<u>TOPIC NO. 1:</u> <u>CREATING, COMMUNICATING AND IMPLEMENTING WRITTEN DISCRIMINATION, HARASSMENT AND RETALIATION PREVENTION POLICIES</u>	
<u>Standard HR Practices Regarding Written Prevention Policies</u>	EMPLOYER'S ACTUAL PRACTICES AND POLICIES
An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented.	
An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically.	
The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce.	
Other measures to ensure effective dissemination of the policy and complaint procedure should be taken, including posting them in central locations and incorporating them into employee handbooks.	
An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements: <ul style="list-style-type: none"> a. A clear explanation of prohibited conduct; b. Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation; c. A clearly described complaint process that provides accessible avenues of complaint; 	

<p>d. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;</p> <p>e. A complaint process that provides a prompt, thorough, and impartial investigation; and</p> <p>f. Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.</p>	
<p>Authorities: 29 C.F.R. § 1604.11(f); EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999, 2010) available at https://www.eeoc.gov/policy/docs/harassment.pdf; EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at https://www.eeoc.gov/policy/docs/currentissues.html</p>	
<p>CALIFORNIA TRACK:</p>	
<p><u>REGULATIONS REGARDING THE DUTY TO CREATE, POST, AND DISTRIBUTE WRITTEN DISCRIMINATION AND HARASSMENT POLICIES:</u></p>	
<p>1. <u>Duty to Provide Written DFEH Information Pamphlet, or its equivalent</u></p>	
<p>This is a minimum requirement in California. California requires all employers of one or more employees to devise, disseminate and implement written anti-harassment policies. Employers are required to fully inform employees of their rights in writing. The policy is required to have the information contained in the DFEH pamphlet and must be given to the employee: See the DFEH Information Pamphlet, available at http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-185.pdf 2 CCR § 11023(b); Cal. Govt. C. § 12950(b)</p>	
<p>Cal. Govt. Code § 12950(b) Each employer shall distribute this information sheet to its employees, unless the employer provides equivalent information to its employees that contains, at a minimum, components on the following:</p>	
<p>(1) The illegality of sexual harassment.</p>	
<p>(2) The definition of sexual harassment under applicable state and federal law.</p>	
<p>(3) A description of sexual harassment, utilizing examples.</p>	
<p>(4) The internal complaint process of the employer available to the employee.</p>	
<p>(5) The legal remedies and complaint process available through the department.</p>	

(6) Directions on how to contact the DFEH.	
(7) The protection against retaliation provided by Title 2 of the California Code of Regulations for opposing the practices prohibited by this article or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by the department or the council.	
Cal. Govt. Code § 12950(c) The information sheet or information required to be distributed to employees pursuant to subdivision (b) shall be delivered in a manner that ensures distribution to each employee, such as including the information sheet or information with an employee's pay.	
Cal Govt. Code § 12950(d) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the information sheet or information required to be distributed pursuant to this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.	
2. <u>Duty to Post the Policy</u>	
<p>This is a minimum requirement in California. Each employer shall post the DFEH poster in a prominent and accessible location in the workplace.</p> <p>Cal. Govt. Code § 12950(a); See, DFEH Poster, available at http://www.dfeh.ca.gov/res/docs/Publications/DFEH-162-2015.pdf</p>	
3. <u>Duty to Provide Written Policy</u>	
<p>This is a minimum requirement in California as of April 1, 2016.</p> <p>2 CCR § 11023(b)</p> <p>In addition to distributing the Departments DFEH-185 pamphlet or alternative writing, California employers must have a harassment, discrimination and retaliation policy that:</p>	
(1) Is in writing;	
(2) Lists all current protected categories covered under the Act;	

(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;	
(4) Creates a complaint process to ensure that complaints receive: (A) An employer's designation of confidentiality, to the extent possible; (B) A timely response; (C) Impartial and timely investigations by qualified personnel; (D) Documentation and tracking for reasonable progress; (E) Appropriate options for remedial actions and resolutions; and (F) Timely closures.	
(5) Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following: (A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or (B) A complaint hotline; and/or (C) Access to an ombudsperson; and/or (D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.	
(6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so 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, pursuant to section 11024 of the Code of Regulations. (2 CCR § 11024)	
(7) Indicates that when an 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.	
(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.	
(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.	
(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.	
(c) Dissemination of the policy shall include one or more of the following methods:	

<p>(1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;</p> <p>(2) Sending the policy via e-mail with an acknowledgment return form;</p> <p>(3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;</p> <p>(4) Discussing policies upon hire and/or during a new hire orientation session; and/or</p> <p>(5) Any other way that ensures employees receive and understand the policies.</p>	
<p>(d) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the policy into every language that is spoken by at least 10 percent of the workforce.</p>	
<p><u>Authorities:</u> Cal. Govt. Code §§ 12920, 12921, 12935(a); 12940, 12950(a), (b), & (d); 2 CCR § 11023(b); See also, <i>Scotch v. Art Institute of California-Orange County, Inc.</i> (2009) 173 Cal.App.4th 986; <i>Trujillo v. No. County Transit Dist.</i> (1998) 63 Cal.App.4th 280, 289; <i>Dept. Fair Empl. & Hous. v. Lyddan Law Group, LLP</i>. (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C)].</p>	

<u>TOPIC NO. 2:</u> <u>ADEQUACY OF THE EMPLOYER'S EEO TRAINING FOR SUPERVISORS</u>	
<u>Standard HR Practices Regarding the Training of Employees.</u>	EMPLOYER'S ACTUAL PRACTICES AND POLICIES
The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment.	
If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.	
An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result.	
Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.	
An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program. For example, an employer could include such compliance in formal evaluations.	
<u>Authorities:</u> EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999, 2010), pp. 18-19, available at https://www.eeoc.gov/policy/docs/harassment.pdf ; EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at https://www.eeoc.gov/policy/docs/currentissues.html	
<u>California Track:</u>	
Since 2004, this has been a minimum requirement in California for employers with 50 or more employees. <u>Mandatory Training for Supervisors</u>	

<p><u>Cal. Gov. C. § 12950.1 (“AB 1825 and AB 2053”) requires all California employers with 50 or more employees to train all supervisors, every 2 years, 2 hours, within 6 mos. of hire, respecting harassment, discrimination and retaliation.</u></p> <p>Unless otherwise noted below, none of these requirements are new.</p>	
<p>The types of training required include Classroom, E-learning, Webinar and other effective interactive training that complies with 2 CCR §11024(2)(A)-(D).</p>	
<p>The training must include questions that assess learning, skill-building activities that assess the supervisor's application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.</p> <p>2 CCR §11024(2)(E)</p>	
<p>The definition of a qualified trainer is provided in 2 CCR § 11024 (9), including the experience and ability to train supervisors on 1) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors' obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 5) how to respond to a harassment complaint; 6) the employer's obligation to conduct a workplace investigation of a harassment complaint; 7) what constitutes retaliation and how to prevent it; 8) essential components of an anti-harassment policy; and 9) the effect of harassment on harassed employees, co-workers, harassers and employers.</p>	
<p>(A) A trainer shall be one or more of the following:</p> <ol style="list-style-type: none"> 1. “Attorneys” admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or 2. “Human resource professionals” or “harassment prevention consultants” working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a. designing or conducting discrimination, retaliation and sexual harassment prevention training; b. responding to sexual harassment complaints or other discrimination complaints; c. conducting investigations of sexual harassment complaints; or d. advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or 	

<p>3. “Professors or instructors” in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964. 2 CCR § 11024 (9)(A)</p>	
<p>Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, professor or instructor because they lack the requisite years of experience may team teach with a trainer, in accordance with 1. through 3. immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees. 2 CCR § 11024(9)(B)</p>	
<p>As of April 1, 2016, an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years, including but not limited to the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider. 2 CCR §11024(a)(2)(C); (b)(2) (2016)</p>	
<p>The training mandated by Government Code section 12950.1 shall include, but is not limited to: 2 CCR § 11024(c)(2)</p>	
<p>A definition of unlawful sexual harassment under the FEHA and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis. 2 CCR § 11024(c)(2)(A)</p>	
<p>FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment. 2 CCR § 11024(c)(2)(B)</p>	
<p>The types of conduct that constitutes sexual harassment. 2 CCR § 11024(c)(2)(C)</p>	

Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability. 2 CCR § 11024(c)(2)(D)	
Strategies to prevent sexual harassment in the workplace. 2 CCR § 11024(c)(2)(E)	
As of April 1, 2016, supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware. 2 CCR § 11024(c)(2)(F) (2016)	
Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions. 2 CCR § 11024(c)(2)(G)	
The limited confidentiality of the complaint process. 2 CCR § 11024(c)(2)(H)	
Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment. 2 CCR § 11024(c)(2)(I)	
As of April 1, 2016, in addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an effective workplace investigation of a harassment complaint. 2 CCR § 11024(c)(2)(J) (2016)	
Training on what to do if the supervisor is personally accused of harassment. 2 CCR § 11024(c)(2)(K)	
The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy. 2 CCR § 11024(c)(2)(L)	

<p>As of April 1, 2016, review of the definition of “abusive conduct” as used in this context (and as defined by Government Code section 12950.1(g)(2) (“AB 2053)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers - including a reduction in productivity and morale. The training should specifically discuss the elements of “abusive conduct,” including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards). Examples of abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.</p> <p>2 CCR § 11024(c)(2)(M) (2016)</p>	
<p>Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.</p> <p>2 CCR § 11024(d)</p>	
<p>An employer who has made a substantial, good faith effort to comply with Cal. Govt. Code §12950.1 (mandatory supervisor training) by completing training of its supervisors prior to April 1, 2016 shall be deemed to be in compliance as though it had been done under the new regulations.</p> <p>2 CCR § 11024(e).</p>	
<p><u>Authorities:</u> Cal. Govt. Code §§ 12935(a), 12926, 12940, 12950 and 12950.1; 2 CCR § 11024 (2016).</p>	

<u>TOPIC NO. 3:</u> <u>EEO TRAINING FOR NON-SUPERVISORS</u>	
<u>Standard HR Practices Regarding the Training of Non-Supervisory Employees</u>	EMPLOYER'S ACTUAL PRACTICES AND POLICIES
See Topic No. 2 above for Title VII cases	
<u>California Track:</u>	
Cal. Govt. Code § 12950(b) requires employers to disseminate the DFEH Information Sheet, or an equivalent document, advising all employees of their rights under the FEHA.	
Cal. Govt. Code § 12950.1(f) The [mandatory] training and education required by 12950.1 is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.	
At the very minimum, employees should be taught the types of conduct that are a violation of law and company policy, should be given detailed information on where to report it, should be assured their complaints will be taken seriously, and will be promptly, thoroughly and objectively investigated, that appropriate remedial action will be taken, and that they will be protected against retaliation for having brought their complaint forward.	
<u>Authorities:</u> Cal. Govt. Code §§ 12950(b) and 12950.1(f); 2 CCR § 11023(b) (2016).	

TOPIC NO. 4:**COMPLAINT PRACTICES AND PROCEDURES**

<u>Standard HR Practice regarding Complaint Procedures</u>	EMPLOYER'S PRACTICES AND PROCEDURES
a. Regarding employee complaints, standard HR management practices provide that employee handbooks should contain a coherent, comprehensive, and fair complaint procedure.	
b. Employees should be assured that their complaint will be promptly, thoroughly, and impartially investigated.	
c. Employees should have various avenues available to them for complaints.	
d. The company should have a HR Department or HR representative either on the premises or otherwise easily accessible to the employees.	
e. An employee should not be required or otherwise penalized for not complaining directly to his/her supervisor if the subject of the complaint is the behavior of the supervisor.	
f. Intermediate protective actions should be taken to prevent any retaliation against the complaining parties.	
g. Assurances should be given that confidentiality of the complaint will be protected to the extent possible. ¹⁴	
h. Assurance that the employer will take immediate and appropriate corrective action when it denies that harassment has occurred.	
i. A record of the complaint, the findings and any remedial action should be made a part of the employee's personnel file.	
<u>Authorities:</u> 2 CCR §§ 11023(b)(4) – (9); Cal. Govt. Code § 12950.1(f); See also, EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful	

¹⁴ Confidentiality is an evolving area. See, *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015). The decision recapitulates a 2012 Board determination which was rendered invalid by the Supreme Court's holding in *NLRB v. Noel Canning* in 2014. In the 2012 NLRB decision, the Board found that the employer violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing the matter while the employer conducted the investigation. *Banner Health System*, 358 N.L.R.B. No. 93 (July 30, 2012). NLRB has provided guidance, stating that specific concerns related to the investigation at issue could justify a request for confidentiality. These include, the need to protect witnesses, the potential danger of the destruction of evidence, the danger of fabricated or false testimony, or the potential for a "cover-up."

Harassment by Supervisors (1999, 2010) available at https://www.eeoc.gov/policy/docs/harassment.pdf ; EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at https://www.eeoc.gov/policy/docs/currentissues.html	
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TOPIC NO. 5:**WORKPLACE INVESTIGATION PRACTICES AND PROCEDURES**

<u>Standard HR Practice Regarding Workplace Investigations</u>	EMPLOYER'S PRACTICES AND PROCEDURES
a. Employee complaints should be investigated promptly, thoroughly and objectively.	
b. Investigator should be neutral, not someone involved, having a grudge, or in the line of command, or on an equal or lower level than the alleged wrongdoer.	
c. The investigator should be someone with whom the claimant can develop a feeling of comfort.	
d. Investigator should be trained on how to properly conduct workplace investigations.	
e. Essential witnesses should be interviewed.	
f. The accused(s) should have a full and fair opportunity to respond to all charges.	
g. Credibility assessments should be made based on the EEO factors, the evidence code, and other recognized sources regarding credibility determinations.	
h. The interviews should be properly documented.	
i. A determination should be made based on this prompt, thorough and objective investigation.	
j. The determination should be based on the preponderance of the evidence.	
k. The investigator's analysis and findings should be documented.	
l. The complainant and respondent should be advised of the determination made by the investigator.	
<u>Authorities:</u> AWI Guiding Principles for Conducting Workplace Investigations (AWI 2014) available at http://www.aowi.org/assets/GuidingPrinciples/guiding%20principles%20140707.pdf ;	

<p>“Practice Pointers for Workplace Investigations,” by Nancy Bornn & Debra Reilly, (SHRM 2010), available at https://www.shrm.org/legalissues/stateandlocalresources/pages/practicepointers.aspx; “Investigating Workplace Harassment: How to be Fair, Thorough, and Legal” by Amy Oppenheimer and Craig Pratt, Society of Human Resource Management (SHRM) 2003, 2008; “Workplace Investigations: Understanding Standard Practices” by Michael A. Robbins and Julie Yanow, (Benders Cal. L&E Bulletin June 2010); EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999, 2010), available at https://www.eeoc.gov/policy/docs/harassment.pdf; EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at https://www.eeoc.gov/policy/docs/currentissues.html; See, also, “How to Conduct an Investigation,” SHRM, Templates and Tools, How-To Guides, 12/6/2010.; <i>“Is There a ‘Standard of Care’ to Define a Reasonable Harassment Investigation?”</i> by Corrie Fischel, J.D., Ann J. Willson, SPHR, and Rhoma Young (SHRM, August 2006).</p>	
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<u>TOPIC NO. 6:</u> <u>REMEDIAL PRACTICES AND PROCEDURES</u>	
<u>Standard HR Practice Regarding Remedial Action</u>	EMPLOYER'S PRACTICES AND PROCEDURES
a. Employer to take appropriate steps to (1) stop the wrongdoing, (2) prevent further wrongdoing, and (3) correct the harm that has occurred.	
b. Remedial measures should not adversely affect the claimant.	
c. These remedial measures need not be those that the claimant requests or prefers, as long as they are effective to stop the wrongdoing, correct its effects on the claimant, and ensure that the wrongdoing does not recur.	
d. To correct the harm, measures should be taken to put the employee in the position s/he would have been in had the misconduct not occurred.	
e. Affirmative steps should be taken to prevent retaliation against the claimant.	
f. Employer should be as consistent as possible by following its own policies and actual practices.	
g. If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.	
h. The complainant should be advised of any corrective action taken.	
<u>Authorities:</u> EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999, 2010) available at https://www.eeoc.gov/policy/docs/harassment.pdf ; EEOC Policy Guidance on Current Issues of Sexual Harassment (1990), available at https://www.eeoc.gov/policy/docs/currentissues.html	

How to Win Harassment, Discrimination and Punitive Damage Claims Without an HR Expert

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Scott Ames, Esq., Los Angeles, Ca

Nancy Bornn, Esq., Playa del Rey, Ca

Amy Oppenheimer, Esq., Berkeley, Ca

Employer's Duty to Prevent, Stop, and Remedy Discrimination and Harassment

...

Issue Arises as Part of Case in Chief

- Negligence – employer failed to take reasonable steps to prevent, stop or correct misconduct
- Agency principles – employer knew or should have known and failed to take corrective action
- Punitive Damages

California Track

- Separate Cause of Action
- Not a Stand-Alone Claim

Cite: Cal. Gov. C. § 12940(k); 2 Cal. C.C.R. § 11023(a)(2)

Other State Fair Employment Laws?

As Part of a Defense

Supervisor Harassment Cases Where There is No Tangible Harm

...

Complete 2 prong defense: Burlington Industries, Inc. v. Ellerth (1998) 524 U.S. 742, 753, 118 S. Ct. 2257; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S.Ct. 2275

California Track

Avoidable Consequences Doctrine

Cite: State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026, 1042, 6 Cal.Rptr.3d 441, 79 P.3d 556.

How Does Employer Comply with the Duty?

...

Six Topics to Adequately Address

1. Written Prevention Policies
2. Training Supervisors
3. Training Non-Supervisors
4. Complaint Procedures
5. Investigation Procedures
6. Remedial Action

I. Written Policies

...

Standard HR Best Practices on Written Policies

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;

Written Policies, cont'd.

- Assurance that the employer will protect the confidentiality of complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that wrongdoing has occurred.

Written Policies, cont'd.

- The policy should be clearly and regularly communicated to employees and effectively implemented.
- Every employee should be provided with a copy of the policy and it should be redistributed periodically.
- It should be written in a way that is understandable to all employees in the employer's workforce.
- Effective measures of dissemination should include posting them in central locations and incorporating them in the employee handbooks.

California Track

California Statutory Requirements Written Policies

1. The employer must distribute a DFEH **Information Sheet** or the equivalent content to all employees.
2. The employer must **post policies**.
3. Employers (1+ employees) are required to **devise, disseminate and implement** written policies.

Citation: Cal Gov. C. §12950(a) and (b)

I. Information Sheet Content

Minimum components of the Information Sheet:

1. Illegality of discrimination and sexual harassment.
2. Definition under state and federal law.
3. Description, including examples.
4. Description of internal complaint process.
5. The legal remedies and complaint process available through the DFEH.
6. Directions on how to contact the DFEH.
7. Protections against retaliation.

Citation: Cal. Govt. C. §12950(b)(1)-(7)

Information Sheet

- Must be delivered in a manner that ensures distribution to each employee, such as including it with the employee's paycheck.
- Compliance or the failure to comply with this subdivision does not conclusively relieve an employer of liability or result in liability, respectively.

Citation: Cal Gov. C. 12950(c) and (d)

2. Duty to Post

Minimum requirement in California.

DFEH poster must be posted in a prominent and accessible location in the workplace.

Cal. Govt. C. §12950(a)

3. New Requirements for Written Policies

The Prevention Policies must be:

- (1) In **writing**;
- (2) List **all current protected categories** covered under the Act;
- (3) Indicate that the law **prohibits all persons with whom the employee comes into contact** from engaging in conduct prohibited by the Act;

Written Policy Must

- (4) Create a **complaint process** (See Slide No. 43);
- (5) Provide **alternative avenues to complain**, besides the supervisor, including HR manager, hotline, ombudsperson, or DFEH or EEOC;
- (6) Instruct **supervisors to report any complaints** of misconduct to a designated company representative;
- (7) Give assurances employer **will conduct a fair, timely, and thorough investigation**;

Written Policy Must

(8) State that **confidentiality** will be kept by the employer to the extent possible, but **not** indicate that the investigation will be completely confidential;

(9) Promise **appropriate remedial measures** shall be taken where misconduct is found;

(10) Make assurances of **no retaliation**.

Written Policy Must

(c) Dissemination of the policy shall include any method that ensures employees **receive, understand, and acknowledge receipt** of the policy, including providing a copy, emailing a copy, posting on intranet, and/or discussing with new hiree.

(d) Where 10 percent or more of employees spoken language is other than English, employer shall translate the policy into that language.

Cite: 2 CCR § 11023(b) (2016)

2. Supervisor Training

...

Standard HR Practices on Training

- **The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment.**
- **If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.**
- **An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result.**

Supervisor Training, cont'd.

- **Such training should explain the types of conduct that violate the employer's anti- the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.**
- **An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program. For example, an employer could include such compliance in formal evaluations.**

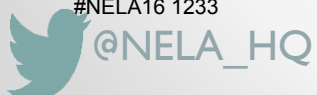
California Track

TRAINING SUPERVISORS

- California requires mandatory training of supervisors for employers with 50 or more employees
- Every 2 years
- 2 hours
- Within 6 months of hire

Citation: Cal. Gov. C. § 12950.1 (AB 1825 and AB 2053)

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#NELA16

Supervisor Training Requirements

- Interactive Training.
- Assessment Testing.
- Qualifications of a Trainer.
- Trainers limited to attorneys, experienced HR professionals, experienced professors or instructors in law schools, colleges or universities.
- Documentation of the Training, including attendance, materials, certificates, etc. must be maintained for a minimum of 2 years.

See, 2 CCR § 11024(2)(A)-(E)

Supervisor Training Content

- Definition of unlawful sexual harassment and other forms of harassment covered by the FEHA.
- Statutory provisions and case law principles.
- The types of conduct that constitute sexual harassment.

Supervisor Training Content, cont'd.

- Remedies available.
- Potential employer/individual exposure/liability.
- Strategies to prevent.
- Supervisor's duty to report.
- Practical examples.
- Limits on confidentiality.
- Reporting resources for victims.
- Remedial action to take.

Supervisor Training Content, cont'd.

- Duty to conduct effective investigation.
- Training on what to do if supervisor is alleged perp.
- Essential elements of employer's policy and how to utilize it.
- Distribution and acknowledgement of receipt of policy.
- Definition of “abusive conduct,” explain negative effects and detrimental consequences on employers.

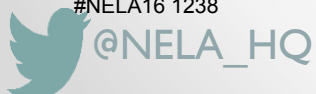
Examples of Abusive Conduct

Examples of abusive conduct may include repeated infliction of verbal abuse, such as

- the use of derogatory remarks,
- insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating,
- or the gratuitous sabotage or undermining of a person's work performance.

Cite: 2 CCR § 11024(c) (2016)

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#NELA16

3. Training of Non-Supervisor Employees

...

Standard HR Practices for Training Non-Supervisors

Cover at least

- the types of conduct that are a violation of law and company policy, and
- where to report it.
- Assurances their complaints will be taken seriously, and
- will be promptly, thoroughly and objectively investigated,

Non-Supervisor Training, cont'd.

- that appropriate remedial action will be taken, and
- that they will be protected against retaliation for having brought their complaint forward.

California Track

California: Additional Training Recommended

The mandatory supervisor training and education required by Cal. Govt. C. § 12950.1(a) is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.

Cite: Cal. Govt. C. § 12950.1(f)

4. Complaint Practices

Standard HR Practices for Complaint Policies

- Handbook should contain a **coherent, comprehensive and fair complaint procedure.**
- Employees should be assured that their complaint will be **promptly, thoroughly and impartially investigated.**
- Employees should have **various avenues available** to them for complaints.

Complaint, cont'd.

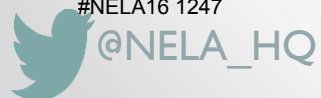
- Company should have an HR Dept. or Representative **on the premises or otherwise easily accessible** to employees.
- An employee should **not be required or otherwise penalized** for not complaining directly to his/her supervisor if the subject of the complaint is the supervisor.
- **Intermediate protective actions** should be taken to prevent any retaliation against the complaining parties.

Complaint, cont'd.

- Assurances should be given that **confidentiality** of the complaint will be protected to the extent possible.
- Assurances that the employer will take **immediate and appropriate corrective action**.
- A **record** of the complaint, findings and remedial action should be made a part of the alleged **wrongdoer's personnel file**.

Cite: EEOC Enforcement Guidance (1999, 2010)

#NELA16 1247



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California Track

Consistent with Written Policy Requirement 2 CCR § 11023(b)

The written policy must create a complaint process to ensure that the complaints receive:

- (A) An employer's designation of confidentiality, to the extent possible;
- (B) A timely response;
- (C) Impartial and timely investigations by qualified personnel;
- (D) Documentation and tracking for reasonable progress;
- (E) Appropriate options for remedial actions and resolutions; and
- (F) Timely closures.

5. Investigations

Standard HR Practices for Investigations

- Employee complaints should be investigated promptly, thoroughly and objectively.
- Investigator should be neutral, not someone involved, having a grudge, or in the line of command, or on an equal or lower level than the alleged wrongdoer.
- The investigator should be someone with whom the claimant can develop a feeling of comfort.

Investigations, cont'd.

- Investigator should be trained on how to properly conduct workplace investigations.
- Essential witnesses should be interviewed.
- The respondent(s) should have a full and fair opportunity to respond to all charges.

Investigations, cont'd.

- When a finding rests on credibility, the investigator should make Credibility Assessments.
- The investigator can look to the EEOC guidelines and/or the evidence code.
- This could include motive to lie, past record, corroboration and inherent plausibility.
Demeanor should be used with caution.

Investigations, cont'd.

- Investigators should be trained in how to weigh and assess credibility.
- The interviews should be properly documented.
- A determination should be made based on this prompt, thorough and objective investigation.

Investigations, cont'd.

- The determination should be based on a preponderance of the evidence.
- The investigator's analysis and findings should be documented.
- The complainant and respondent should be advised of the determination made.

AWI Guiding Principles for Conducting Workplace Investigations (AWI 2014); EEOC Enforcement Guidance (1999, 2010)

6. Remedial Action

Standard HR Best Practices for Remedial Action

- Take appropriate steps to **stop** the wrongdoing,
- **prevent** further wrongdoing,
- and **correct** the harm that has occurred.

Remedial Action, cont'd.

- Remedial measures should not adversely affect the claimant.
- Remedial measures need not be those the claimant requests or prefers, so long as they are effective to stop the wrongdoing, correct its effects on the claimant, and ensure it does not recur.
- Measures should be taken to put the claimant in the position s/he would have been in had the misconduct not occurred.

Remedial Action, cont'd.

- Affirmative steps should be taken to prevent retaliation against the claimant.
- Employer should be consistent as possible by following its own policies and actual practices.
- If no determination can be made, employer should still train and monitor workforce.
- Claimant should be advised of the corrective action taken.

EEOC Enforcement Guidance (1999, 2010)

THE END