

# 10 Things You Might Not Know About Sexual Harassment: What You Don't Know Can Hurt You

By CalChamber Employment Law Counsel

**W**e know we must prevent sexual harassment in the workplace. California employers must put up harassment prevention posters, distribute anti-harassment pamphlets and establish policies prohibiting harassment. If you're an employer with 50 or more employees, you've also been required by law to train your supervisors. However, under a law that took effect on January 1, 2019, this training requirement was expanded to employers with five or more employees. In addition, training is required for all employees — not just supervisors. [CalChamber's training courses for supervisors and employees](#) can easily help your company meet this new requirement.

Despite our collective knowledge about the right thing to do, the problem has not gone away — as demonstrated by headline-grabbing incidents spurring the recent #MeToo movement, in which women (for the most part) have come forward about their encounters with male co-workers, supervisors, potential bosses and venture capitalists.

In fact, nearly 6,700 claims of sexual harassment were filed with the Equal Employment Opportunity Commission (EEOC) in fiscal year 2017 — and the EEOC obtained \$46.3 million in monetary benefits for victims of sexual harassment. What's more, the state Department of Fair Employment and Housing recognized that sexual harassment claims remain prevalent across industries and economic sectors, renewing its focus and creating a Sexual Harassment Prevention Task Force.

Learning the following 10 things about sexual harassment may just keep your employees — and therefore you — out of trouble.

## **A worker who goes home at night to find sexually suggestive posts from a co-worker won't feel comfortable coming to work the next day.**

### **1. The “New” Harassment**

Sexual harassment might look different today; in the past, managers worried about racy pinup calendars and in-person interactions at the office. But technology's proliferation has opened up additional avenues of interaction. These days, texts, emails or posts on social media sites like Facebook, Twitter and Snapchat (where posts instantly disappear) may also be causing problems in your workplace.

Employees also may be interacting after hours on social media — commenting on each other's profiles, tweeting, or viewing and “liking” posts. They may be sharing more private information and making comments online that they might never feel comfortable saying face-to-face.

Whether they're using their personal cell phones, laptops or tablets — or company-provided equipment — to make harassing comments during or after work hours won't matter. Don't make the mistake of thinking that because it happened after hours or on personal equipment, you can ignore it. A worker who goes home at night to find sexually suggestive posts from a co-worker won't feel comfortable coming to work the next day.

Treat it just as you would any other harassment complaint. Train your workers to understand that online harassment of a co-worker after hours violates company policy.

## 2. Eyes on You: Staring, Glaring and Leering

Many types of unwanted physical, verbal and visual behaviors can constitute sexual harassment — including some you might think are innocuous. While not all stares are sexual harassment, some are. There's a difference between a non-sexual stare from someone who's lost in thought versus blatant leering, in which someone looks a person up and down, or other lascivious expressions.

Courts have held, for instance, that a supervisor leering at a female employee's breasts over a period of years was unwelcome, offensive harassment — not just unprofessional behavior (*Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008)).

There is no mechanical formula to identify a hostile work environment. Look at each situation on a case-by-case basis.

## 3. Outside In, Inside Out

California's Fair Employment and Housing Act (FEHA) provides broad protections against harassment to a number of individuals entering the workplace: employees, applicants, interns, volunteers and people "providing services pursuant to a contract," such as independent contractors.

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And if a vendor or customer continuously enters your workplace and harasses employees, you have to deal with that situation, too. Under FEHA, employers have an obligation to protect employees from sexual harassment committed by nonemployees coming into the workplace. An employer can be held liable if the employer, its agents or supervisors know or should have known of the harassment and fail to take immediate and appropriate corrective action (2 CCR sec. 11034(f)(2)(C)).

Make sure your employees know these rules.

## 4. It's Not About Desire

Sexually harassing conduct does not need to be motivated by sexual desire. In other words, Jamie doesn't have to want to date Bob in order to harass him. If she repeatedly makes sexually offensive comments to him, that can be harassment.

An example of this is when the perpetrator acts out of hostility toward the individual because of the individual's gender or sexual orientation, not out of sexual desire. Courts have ruled that abusive comments or hostile conduct directed toward someone because of his/her gender can amount to unlawful sexual harassment, regardless of whether the treatment was actually motivated by sexual desire. For example, a male manager who constantly shouts at and makes threatening gestures toward women — but not men — may have violated the law.

## 5. But it Was Consensual!

A common cry from the alleged harasser: “It was consensual.” We have seen this play out time and time again. Despite all appearances, a relationship may not truly be consensual or welcome, and this is especially true when the relationship is between a supervisor and a subordinate given the power dynamic involved. Power dynamics have been a factor in many of the recent allegations involving Hollywood moguls, medial influencers and government officials.

Don’t just ignore employees who are involved romantically with each other — especially in a supervisor/subordinate situation. California employers are subject to strict liability for sexual harassment claims involving a supervisor. Employers may be held liable for their supervisors’ actions, regardless of whether they knew about the behavior, and policies against such behavior will not insulate employers from the liability.

Workplace romances can cause a host of other problems, including perceptions of favoritism, disruptiveness and unprofessionalism. And when the relationship ends, the claims may begin. For instance, one party might not stop pursuing the other — causing a hostile work environment.

Because employers have a duty to prevent harassment in the workplace, managers will want to pay attention to any workplace romance due to legal risks and address conflicts of interest.

## 6. It Only Happened Once

Harassing behavior needn’t be repeated to be unlawful. The standard is “severe **or** pervasive.” While isolated incidents will not always meet the test, there are circumstances when a single severe incident can support a claim. For example, courts have found that a single incident of sexual assault or particular acts of physical groping can create liability.

**Employers may be held liable for their supervisors’ actions, regardless of whether they knew about the behavior.**

## 7. Nobody Has to Say “Stop”

It can still be unwelcome, unlawful harassment even if the victim never told the perpetrator to knock it off. Although a clear message from the victim that the conduct is offensive can put an end to it, **never require** the victim to tell the harasser to stop before you will act on the complaint.

In some situations, the victim will not be comfortable approaching the harasser due to the ongoing pattern of behavior. Forcing a confrontation also could potentially subject the victim to further harassment or place the victim in danger.

## 8. Complaints Can Take Many Forms

There is no requirement that a harassment complaint be made in a particular way, such as in writing, or be brought to a particular person, such as only to the immediate supervisor or only to HR. A complaint can be verbal, anonymous or lodged by someone other than the alleged victim (such as a co-worker who witnessed it). Managers should be trained that they’re obligated to respond to harassment of which they’re aware, including an incident that has been reported to them.

In fact, California law requires employers to have a written policy that informs employees of their complaint mechanism and explains that they don't have to complain directly to their immediate supervisor. Employers must provide an alternative complaint mechanism and instruct supervisors to report any and all complaints of misconduct.

**Have a zero tolerance policy that aims to prohibit disrespectful and unprofessional conduct before it becomes a legal violation.**

## 9. Don't Just Prohibit "Unlawful" Harassment

It's not enough for a company policy to only prohibit "unlawful" harassment. If you wait until the harassment is unlawful before it's prohibited, you've waited too long. The company is now liable.

Instead, your company should have a zero tolerance policy that aims at prohibiting disrespectful and unprofessional conduct **before** it becomes a legal violation. Your policy should inform employees that the company will not tolerate harassment of any type and takes harassment claims seriously.

## 10. You Can't Promise Confidentiality

While it might be tempting to try and put an employee at ease by telling him/her that any complaint is "confidential," such promises should not be made. The company has a legal obligation to investigate the harassment, and events and names may inevitably be disclosed during the course of the investigation.

A fair investigation gives the alleged harasser an opportunity to respond to the complaint effectively. This almost always includes disclosing the complainant's identity.

Instead of promising confidentiality, inform the complainant that you will disclose information on the complaint and investigation only on a need-to-know basis. Also stress your anti-retaliation policy to all parties and witnesses in the investigation.

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