

2019 cali for nia

LEAD ADVOCATE IMPACT

STATE LEGISLATIVE & HR CONFERENCE

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Reality Check: Accusations and Concerns in the Workplace

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#MeToo

- Harvey Weinstein
 - Kevin Spacey
 - Louis CK
 - Matt Lauer
 - Charlie Rose
 - Warren Moon
 - Mark Halperin
 - Garrison Keillor
 - Sen. Al Franken
 - Rep. Trent Franks
 - Rep. John Conyers
 - Steve Wynn
 - Eric Schneiderman
 - John Lasseter
 - Roy Moore
 - Bill Cosby
 - James Toback
 - Brett Ratner
 - Tom Brokaw
 - Les Moonves
- And the list goes on...



Legal Basics

Sexual Harassment Is:

1. Conduct
2. Of a sexual nature, or that is sex-based
3. That is unwelcome, where there is either
 - a. Quid Pro Quo Harassment
meaning that submitting to the conduct is either expressly or implicitly made a term or condition of employment; or submitting to or rejecting the conduct is used as a basis for employment decisions affecting that individual; or
 - b. Hostile Work Environment Harassment
meaning that the conduct is sufficiently severe or pervasive so as to alter the conditions of employment or create an intimidating, hostile or offensive working environment

Elements of Hostile Work Environment Harassment

- Conduct = anything
- Unwelcome
- Point of view
 - Objective – reasonable person
 - Subjective – victim actually offended
 - Intent – harasser's motivation?
- Severe or pervasive – law does not vindicate trivial or petty slights
 - Severe = the nature of the conduct itself
 - Pervasive = the frequency of the conduct

Employer Liability

Title VII of the Civil Rights Act of 1964

- Co-worker or non-employee harassment: **knew** or **should have known** unless immediate and appropriate corrective action
- Supervisor harassment: **strict liability** if “tangible employment action”
- No ‘tangible employment action’: **Affirmative defense** if employees fail to avail themselves of policies and procedures in place to prevent harassment
 - Tangible employment action – significant change in employment status

Fair Employment and Housing Act

- Co-worker harassment: **knew or should have known** and failed to take immediate and appropriate corrective action
- Supervisor harassment: **strict liability**
- **Affirmative defense** of “avoidable consequences” to reduce damages but not to avoid liability

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Harasser Liability For Bad Conduct

- Personal Liability of Harasser
 - Employer responsibility?
 - Statutory Indemnity – Labor Code Section 2802
 - Contractual Indemnity
 - No indemnity for punitive damages
 - Insurance
 - EPLI
 - D&O

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Company Exposure To Harasser

- Differential treatment
 - Suspension/Unpaid leave = Adverse action
 - Following policies
- Defamation
- Privacy
- Interference with prospective economic advantage
- Breach of contractual obligations
- Remedies
 - Damages
 - Injunctive relief

Sexual Harassment Omnibus Bill [SB 1300]

The purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace

- Approved Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems*: "a plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it **more difficult to do the job.**"
- Rejected the Ninth Circuit's opinion in *Brooks v. City of San Mateo*: A **"single incident of harassment is sufficient** to create a triable issue of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."
- Affirmed the decision in *Reid v. Google, Inc.* in its **rejection of the "stray remarks doctrine."** The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination.
- Rejected the decision in *Kelley v. Conco Companies*: "The legal standard for sexual harassment should **not vary by type of workplace.**"
- Affirmed the Court's observation *Nazir v. United Airlines, Inc.* that "hostile working environment cases involve issues **"not determinable on paper,"** stating that the Legislature intends that harassment cases are rarely appropriate for disposition on summary judgment.

Sexual Harassment Omnibus Bill [SB 1300]

- Expands potential FEHA liability for acts of nonemployees to all forms of unlawful harassment (removes “sexual” limitation).
- Prohibits a prevailing defendant from being awarded attorney’s fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.
- Authorizes (but does not require) employers to provide bystander intervention training.

What Is An Employer To Do?

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California Supreme Court

Cotran v. Rollins Hudig Hall International, Inc.

- Employee terminated for misconduct
- Wrong question: Whether misconduct occurred?
- Right question: Did employer have reasonable grounds for believing misconduct occurred?
- Requires an investigation
 - Notice of alleged misconduct
 - Opportunity to respond

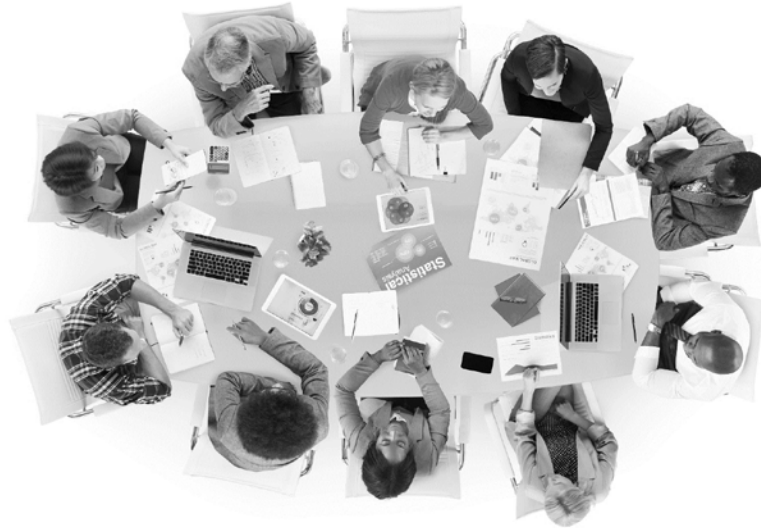
“High Level” Harassers

How to Protect the Company

- Respond & Remediate
 - Inaction on C-Suite harassers is greatest exposure
- Use carrots + sticks
 - Employment agreements
 - “Just cause” definition
 - Severance payments
 - Reward executive managers for eliminating claims
 - Weinstein Clauses
 - Attest to no sexual harassment
 - Right to claw back money
 - “Social” due diligence
- Deny indemnity
 - Insurance – coverage?
 - EPLI
 - D & O

Buy-in at the Top

Leaders have enormous potential to influence company culture and expectations, including with respect to workplace harassment



Zero Tolerance

- All incidents – regardless of severity – gets a response
- Applies even when persons at the top of the company are implicated – NO ONE gets a “free pass”
- **BUT: Response must be proportionate to offense**
 - EEOC Guidance – “Zero tolerance” may convey one size fits all approach
 - Such an approach expressly rejected by EEOC
 - Goal is to stop harassment, not punish harasser

Strong Messaging

- **Clearly communicate to leaders** – all the way up to the board of directors – that they are required to enforce the company's policy against sexual harassment to immediately report ANY harassment of which they become aware regardless of the level or status of the alleged harasser or victim
- **Even a single act, if severe enough, may subject the leader and the company to liability**
- **C-Suite Pre-nup?**

Training 2.0

- Separate training for C-Suite? Board members?
- Increase frequency
- Consider periodic short updates and reminders
- Require for all staff – but separate from supervisor training
- Live v. online
- Tailor content
- Vary content
- NOTE: Employers with 5 or more employees must train all employees by 1/1/2020

The background of the slide is a blue-tinted photograph of the California State Capitol building. The image shows the grand dome and classical columns of the building. In the foreground on the left, there is a statue of a figure, possibly representing Justice or Liberty, and several flags are flying on a tall pole. The overall tone is professional and official.

Responding to Complaints

It Starts With Reporting

LEAD
ADVOCATE
IMPACT

- Make it easy to come forward!
- Provide multiple avenues for reporting to bypass an executive or direct supervisor who's implicated
- Consider direct reporting to the CEO or board of directors
- All voices must be heard
- Promise no retaliation
- Maintain confidentiality – but don't promise complete confidentiality

Why Investigate?

- Discharge duty to prevent harassment
- Affirmative defense against claims by alleged victims
- Cotran defense against claims by alleged harasser
- Avoid ratification
- Avoid punitive damages
- Defense against future claims
- Publicize actions taken?
 - Matt Lauer case

Best Practices - Investigating Complaints

- Prompt and timely
- Impartial and fair – “Due process”
- Is an outside investigator needed?
- Interim measures (if needed)
- Confidentiality (to extent possible)
- Appropriate remedial action
- Avoid punishing the victim
- Follow up communication to complainant and accused
- No retaliation
- Subsequent follow up to make sure harassment has stopped
- Documentation
- Privilege issues

Employers have an obligation to investigate all reports of harassment

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Remedial Action

- Goal: Remediate – Not Punish
- Two Steps:
 - Correct the current situation
 - Prevent it from repeating in the future
- **Don't turn a blind eye because the harasser is a company leader**
- **But don't rush to judgment**
 - Companies inactive on leaders accused of harassment is basis for punitive damages

Hush Money?

Non-Disclosure/Confidentiality Restrictions [SB 820]

- Prohibits any provision in a settlement agreement that prevents the disclosure of factual information related to a claim filed in a civil or administrative action, regarding sexual assault, or an act of workplace harassment or discrimination based on sex.
- Applies to settlement agreements entered into on or after January 1, 2019.
- Does not prohibit:
 - A provision that precludes the disclosure of the settlement amount.
 - At the request of the claimant, any provision that shields the claimant's identity or any fact that could reveal the claimant's identity.



Confidential Settlements...And Taxes

New federal tax law prevents deductions for certain sexual harassment or abuse settlements

Section 162(q) of the tax code:

PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE –

No deduction shall be allowed under this chapter for – (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment.



Settlement Agreements

Ban on Waivers of Right to Testify [SB 3109]

- Voids any provision in a contract or settlement agreement that waives a party's right to testify regarding criminal conduct or sexual harassment on the part of the other party to the contract or the other party's agents or employees.
- Applies to testimony required or requested by the court, administrative agency, or legislative body.
- Applies to any contract or settlement agreement entered into on or after January 1, 2019.



Release Agreements

- Prohibits an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of continued employment, to: (1) sign a release of FEHA claims or rights or (2) sign a document prohibiting disclosure of information about unlawful acts in the workplace, including non-disparagement agreements.
 - Does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution, or through the employer's internal complaint process.
- Carve outs for arbitration clauses?

Best Practices

- Adopt and enforce strongly worded anti-harassment policy
- Establish and publicize an effective complaint process
- Respond promptly to all complaints of workplace harassment
- Take necessary corrective action to end harassment
- Implement harassment training for all employees
- Special training for company leaders



THANK YOU!