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The Future of Preventing Harassment & Discrimination in the Workplace: Bystander Intervention Training

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2019 California Legislative Updates
BREAKING NEWS!

California legislature responds to #metoo and TIMES' UP by adopting a number of new legislation to prevent harassment and discrimination in the workplace, effective January 1, 2019.
Senate Bill 224 – Professional Relationships: Civil Liability and Enforcement

• The Unruh Civil Rights Act establishes liability for sexual harassment when the plaintiff proves specified elements, including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant.

• SB 224 now adds that a plaintiff can establish sexual harassment by proving, among other things, that the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party.
Senate Bill 224 – Professional Relationships: Civil Liability and Enforcement

• Existing law also includes physicians, psychotherapists, dentists, attorneys, holders of a master’s degree in social work, real estate agents, real estate appraisers, investors, accountants, bankers, trust officers, financial planners, loan officers, collection services, building contractors, escrow loan officers, executors, trustees, administrators, landlords, property managers, teachers, or any “relationship that is substantially similar to any of the above”.
Senate Bill 224 – Professional Relationships: Civil Liability and Enforcement

• SB 224 adds investors, *elected officials*, lobbyists, directors, and producers to the list of the types of relationships that could be subject to sexual harassment liability.
Assembly Bill 2770 – Privileged Communications by Former Employer Concerning Sexual Harassment

- Existing law makes certain publications and communications privileged and therefore protected from civil action (such as slander and libel), including certain communications concerning the job performance or qualifications of an applicant for employment that are made without malice by a current or former employer to a prospective employer.
Assembly Bill 2770 – Privileged Communications by Former Employer Concerning Sexual Harassment

AB 2770 adds that the following communications are privileged:

1) complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence; and

2) communications between the employer and interested persons regarding a complaint of sexual harassment.
Assembly Bill 2770 – Privileged Communications by Former Employer Concerning Sexual Harassment

AB 2770 specifically authorizes an employer to answer, without malice, whether the employer would rehire a current or former employee and whether a decision not to rehire is based on the employer’s determination that the former employee engaged in sexual harassment.
SB 820 – Confidentiality in Settlement Agreements

• Stand Together Against Non-Disclosures (STAND) Act

• Prohibits confidentiality clauses in settlement agreements if they would limit the disclosure of factual information related to sexual assault, sexual harassment, workplace harassment/discrimination based on sex, retaliation for reporting an act of harassment/discrimination based on sex; or a failure to prevent harassment/discrimination based on sex.

• Does not prohibit a provision that precludes the disclosure of the amount paid in settlement of a claim.
SB 820 - Stand Together Against Non-Disclosures (STAND) Act

“As we have clearly seen over the last few months, secret settlements serve one primary purpose: to keep sexual predators away from the public eye and continuing to torment and hurt innocent victims. California successfully eliminated the statute of limitations on rape and sexual assault in 2016. Our state must again stand with victims of sexual harassment and assault by ending this unjust practice of secret settlements that keep these aggressors accountable and able to prey on other victims ... These perpetrators should not be allowed to endanger others or evade justice simply because they have a fat wallet at their disposal. SB 820 will not prevent people from mutually agreeing to settle, but it will simply prevent the perpetrator from requiring the victim to remain silent about the harassment as a condition of settlement. Everyone deserves to live and work free from sexual harassment, assault and discrimination. The STAND Act helps to end the curtain of secrecy that has existed for far too long.”

Senator Connie M. Leyva (D-Chino)
AB 3109 – Waiver of Right of Petition or Free Speech in Contracts and Settlement Agreements

AB 3109 makes any contractual provisions void and unenforceable if it waives a party’s right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.
Senate Bill 1300 - Mother Of All #MeToo Bills
SB 1300 – Unlawful Employment Practices

- Prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.
SB 1300 – Unlawful Employment Practices

- Exception: “Negotiated Settlement Agreement” can include release of FEHA claims under following conditions:
  - an underlying FEHA claim has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through the employer’s internal complaint process;
  - the agreement must be “voluntary, deliberate, and informed;”
  - it must provide consideration of value to the employee; and
  - the employee must be given notice and an opportunity to retain an attorney or is represented by an attorney.
SB 1300 – New FEHA Provision
(Govt’ Code § 12923)

• Adopts the legal standard that a plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment, and it is sufficient 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. (See Harris v. Forklift Systems (1993) 510 U.S. 17, 26.)
SB 1300 – New FEHA Provision (Govt’ Code § 12923)

• A single incident of harassing conduct is sufficient to create a triable issue regarding the existence 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. (Rejecting Brooks v. City of San Mateo (2000) 229 F.3d 917.)
SB 1300 – New FEHA Provision
(Govt’ Code § 12923)

• 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-decisionmaker, may be relevant, circumstantial evidence of discrimination. (Affirming Reid v. Google, Inc. (2010) 50 Cal.4th 512 and specifically rejecting the “stray remarks doctrine.”)
SB 1300 – New FEHA Provision (Govt’ Code § 12923)

- The legal standard for sexual harassment should not vary by the type of workplace. As a result, it is not a relevant excuse that a particular occupation “may have been characterized by a greater frequency of sexually related commentary or conduct in the past.” Courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. (Disapproving Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.)
SB 1300 – New FEHA Provision
(Govt’ Code § 12923)

• Establishes the Legislature’s intent that harassment cases are rarely appropriate for disposition on summary judgment. (Affirming Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues “not determinable on paper.”)
SB 1300 – Harassment by Non-Employee

• SB 1300 also would subject an employer to liability for the acts of nonemployees, with respect to any type of harassment prohibited under FEHA of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action.
SB 1300 – Bystander Training

“An employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.”

Government Code Section 12950.2
SB 1300 limits a prevailing employer’s ability to recover attorney and expert witness fees unless a court finds a plaintiff’s action was “frivolous, unreasonable, or totally without foundation.”
Senate Bill 1343 – Sexual Harassment Training Requirements

• Existing law under the Fair Employment and Housing Act (“FEHA”) requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment, abusive conduct, and harassment based upon gender, as specified, to all supervisory employees within six months of their assumption of a supervisory position and once every two years;

• SB 1343 now requires all employers who employs five or more employees, including temporary or seasonal employees, to provide by January 1, 2020 at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees within 6 months of their assumption of the position, and once every two years thereafter;

• Beginning on January 1, 2020, an employer must provide sexual harassment trainings to all seasonal employees, temporary employees, and any employee hired to work for less than six months within 30 calendar days or within 100 hours worked, whichever comes first.
What if my employees were trained between January 1 and December 31, 2018?
The law requires that employees be trained during calendar year 2019. Employees who were trained in 2018 or before will need to be retrained.
By what date must employees be trained?
Both managerial and non-managerial employees must receive training by January 1, 2020. After January 1, 2020, employees must be retrained once every two years. That means that all employees statewide must be retrained by January 1, 2022.
Senate Bill 826 – Corporations Boards of Directors

• Under SB 826, no later than the close of the 2019 calendar year, a domestic general corporation or foreign corporation that is a publicly held corporation located in California must have a minimum of one female on its board of directors. In addition, no later than the close of the 2021 calendar year, the required minimum number increases to two female directors if the corporation has five directors or to three female directors if the corporation has six or more directors.

• Although this does not apply to public agencies, agencies are reminded of the importance of diversity and gender equality in hiring practices.
Vetoed Bills

• AB 3080, which would have banned mandatory workplace arbitration agreements and confidential agreements regarding workplace sexual harassment;

• AB 1867, which would have required large employers to maintain records of sexual harassment for at least five years after the last day of employment of both the complainant and alleged harasser; and

• AB 1870, which would have extended the period to file certain DFEH discrimination complaints from one year to three years.
BREAKING NEWS!

SB1300 authorizes California employers to provide bystander intervention training to their employees.
Why Are We Here?

- An employer may also provide bystander intervention training that includes *information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors*. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.

Gov’t Code § 12950.2
Who is a “Bystander”?

“One who is present but not taking part in a situation or event: *a chance spectator.*”

Merriam-Webster Dictionary
To Act ... Or Not to Act

**Act**
- Direct
- Distract
- Delegate
- Delay
- Document

**Not Act**
- Observe
- Walk Away
In What Situations Can One Be a Bystander?

- HARASSMENT
- DISCRIMINATION
- RETALIATION
- SEXUAL ASSAULT
- BULLYING
Reasons Why Bystanders Choose Not to Intervene

- Someone else will step in.
- I’ll be called a snitch, and snitches get stitches!
- If I say anything, he’ll turn on me next!
- I don’t like what she is doing, but she is still my friend.
- I would’ve said something, but I don’t know the perpetrator that well.
- You’re asking me to stand out on purpose?
- It’s really none of my business.
- The victim deserves it.
- I just don’t know what to do to make it stop.
“Courage is the first of human qualities because it is the quality which guarantees all others.”

—Winston Churchill
Roles of a Bystander
Find Help

A bystander can find help from HR, management, or another person of authority.
Offer Help and Encouragement

A bystander can offer help, support and encouragement to the victim.
Cyber Bystander

A cyber-bystander can forward mean links, texts, images or posts to HR, management, or a person of authority, or by posting something nice about them online or sending them a friendly message.
Take Action

A bystander can stand up to the person doing the bullying and stop the behavior.
It’s a Shared Responsibility!

• It is everyone’s problem when someone acts improperly;
• Nobody deserves to be victimized;
• You may have to be the first person to step up;
• It’s a big deal to the person being victimized;
• *You can break the cycle!*
Responding as a Bystander
Remember the 5 “D’s”
First D – **Direct**

- If it is safe to do so, directly respond by naming what is happening or confronting the harasser:
  - “I don’t think that is appropriate, respectful, okay, etc.”
  - “Leave them alone.”

- Keep it short and succinct, and only direct with caution.
Second D - *Distract*

- Distraction is a subtler and more creative way to intervene; the aim here is simply to derail the incident by interrupting it.
- Ignore the harasser and engage directly with the person who is being targeted, and talk about something completely unrelated.
Third D - Delegate

- Delegation is when you ask for assistance, for a resource, or for help from someone else.
- Find the supervisor, manager, or someone of authority, and ask them to intervene.
Fourth D - *Delay*

- Even if you can’t act in the moment, you can make a difference for the person who has been victimized by checking in on them after the fact.
Fifth D – Document

• Whenever possible, always try to document shortly after the incident, and record the date/time, who, when, where, and how it happened.

• Managers and supervisors especially have a duty to both document and report any incidents.
Let’s Act (It) Out!
Why Should We Intervene?
How Tough Is It to Change a Culture of Sexual Harassment? Ask Women at Ford (2017)

“He talked about his penis ... all of 10 to 12 inches of penis ... offering that to another lady on the line as well. The lady came and told me what he said. He knew she told me ... When she got into the car and drove off the lot, I was next to drive down. He looked at me and said, ‘You know you can have some of this too.’”

VICTIM # 1
“There were instances where he would come up and smack me on my bottom. The day that really sent me over the edge ... I was loading a robot, and he walked into the same cell that I'm in, and grabs my behind. I turned around to him, and I said, "Keep your hands to yourself. As I've told you plenty of times before, I'm not interested.”

VICTIM # 2
“When you speak up, you're like mud in the plant. And you know people talk about you and call you names, and say things about you that are not true. Because they think that you squealed on something that should have been kept inside.”

VICTIM # 3
“It's hard when every day you come in, and if you say something, and something is done, it gets worse. So that's why a lot of women do not complain ... they don't say anything.”

VICTIM # 4
“Every time I would have a new instance of something sexual happen, because I had already seen the ramification of saying anything, I would stand there and take it. And every time, each time that I was taking it again and again, it just felt like more of me diminishing, just getting smaller until it was just like a shell of a person.”

VICTIM # 5
“On behalf of myself and the employees of Ford Motor Company, who condemn such behavior and regret any harassment as much as I do, I apologize. More importantly, I promise that we will learn from this and we will do better.”

JIM HACKETT
President and chief executive of Ford
JUST THINK …

Would it have been different for the women at Ford … if there was a bystander in each and every scenario, who opted to do something?
You Are Powerful!

• Remember, we can all do something.
• It is even more important that we show up for one another as active bystanders.
• By being an active bystander, you have the power to let the person who is targeted know, in some way, however big or small, that they are not alone.
Human Decency and Respect is **Our** Job!

Human decency and respect is a *fundamental job requirement* for everyone:

- Common courtesy;
- Respect competencies;
- Use wisdom;
- Self-monitor;
- Honor personal space;
- Be a decent human being.
Final Words of Wisdom ....

When in Doubt: Cut it Out!
Questions Answers
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