

*California Employment Law Update:*  
February 2018

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# Avoiding and Defending Claims of Sexual Harassment

- Make a respectful workplace part of your company culture.
  - Have a clear anti-harassment policy that makes sexual innuendo at work off limits - because it's impossible to tell "welcome" from "grinning and bearing it" and because inappropriate is on the path to unlawful.
  - You may need to "press the reset button" to get this done.
- Make it easy to report harassment and potential harassment - no writing, no requiring "formal complaints," no impediments to your speedy resolution - because lack of a "formal complaint" is not a defense; nor is "he told me not to do anything" or "she made me promise not to tell anyone."

# Avoiding and Defending Claims of Sexual Harassment

- Investigate every single claim – because the law requires you to investigate and promptly take any appropriate corrective action.
  - Because prompt action that eliminates the problem is a complete defense (i.e., no liability) – except for what your managers do.
  - Circle back to the employee to let him/her know what you did or found.
- Have strong Human Resources – they should be available and independent when needed
  - Employees must feel comfortable going to HR, or they will go elsewhere...to message boards, attorneys, or the press.

# Avoiding and Defending Claims of Sexual Harassment

- Advise the employee that her concerns are being investigated. Remind the employee that this is a confidential investigation.
- Investigate the employee's complaints against the other employee (e.g., offensive language, conduct at work, favoritism, whatever, etc.). Interview witnesses, including any that witnesses the alleged conduct. Take notes during the witness interviews. Remind witnesses about company policy related to harassment investigations.
- Investigations that hold up in court meet the following requirements, so you should strive to achieve this.
- The company maintained a policy and practice that specified how sexual harassment allegations were to be investigated. The policy stated that:
  - Complaints must be treated seriously and investigated immediately.
  - The matter must be treated confidentially.
  - Interviews must be conducted in a private area.
  - The investigator must listen to the allegations, make complete notes, attempt to identify all people involved and all possible witnesses and interview the accused employee.

# Avoiding and Defending Claims of Sexual Harassment

- Review the investigation, and prepare summary/findings of each investigation, which will make determinations. The summary/findings should include:
  - The sequence and process followed from the time the complaint was raised, through the investigation to the final decision.
  - Factual information relevant to the complaint, no assumptions.
  - The key facts you used to make the final decision, including interviews and relevant supporting documentation.
  - Your credibility assessment criteria, which states how the credibility of the individuals who supplied information was assessed.
  - The conclusions
  - Any complaints that were not resolved in the investigation and why they were not resolved.
- Review the summary/findings, and make a determine of remedial action.
  - It could range from anti-harassment training, and discipline/termination for employees who violated policy, depending on what the investigation finds.
  - Add the remedial actions to the summary/findings, and that becomes the “investigation file” along with all of the interview notes.

# Avoiding and Defending Claims of Sexual Harassment

- Even if you don't forbid dating, tell your management why they should not consider the staff their personal dating pool - starting with PERSONAL LIABILITY for harassment, life after break-ups, risk of claims of favoritism, unfairness, retaliation, and damaged reputation.
  - Juries sometimes make the perpetrator pay along with the company.
- Eliminate horseplay - especially if it involves body contact, ice, fruits, or vegetables. Jokes and gestures often result in claims, especially when they are repeated and part of the culture – even if only at one location

# Avoiding and Defending Claims of Sexual Harassment

- Train your assistant managers before you promote them - they are no longer one of the gang. If you have multiple locations, transfer employees promoted into management for the first time to help ease the transition
- Slip in training about inappropriate behavior at work to other meetings or training that you already do, and institutionalize the practice.
  - Train in person whenever possible because employees don't learn all that much from pointing and clicking.

# Avoiding and Defending Claims of Sexual Harassment

- If you allow alcohol consumption at company events, tell managers and supervisors to skip drinks with the staff or to have one drink and exit – alone – because you have liability for management’s off-duty conduct with your employees (not to mention minor employees).
- Take the couch out of the manager’s office – because no good (and no good defense) ever comes from the couch.
- Remove the retaliation risk.
  - Management can’t be guilty of firing someone for refusing sex if management doesn’t attempt sex with the staff.
  - Adopt a dating/socializing policy that forbids management from dating and hanging out off-duty with non-management - because you may have strict liability for your managers’ on and off-duty interactions with your employees.



# Questions?

Thank you for attending today's presentation. Any questions?



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