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**Part 1:  
The Basics**

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**Non-Sexual Harassment**

- Abusive conduct by an employer or employee:
1. Any malicious conduct in a workplace which a reasonable employee would find hostile, offensive, and unrelated to the employer's business.
  2. Includes: verbal abuse; verbal or physical conduct that is threatening; humiliating; embarrassing; or tends to undermine the employees work.
  3. Abusive conduct can be a single act.



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**Non-Sexual Harassment**

- Employers can have liability for Non-Sexual Harassment including:
1. Intentional Infliction of Emotional Distress
  2. Negligent Infliction of Emotional Distress
  3. Interference with Prospective Economic Advantage
  4. Violation of Business & Professions code section 17200.



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Purpose of Training

Sexual Harassment Requirements:

- Employers with **at least 5** employees must provide sexual harassment prevention training and education.
- Supervisors must have at least with 2 hours of training every 2 years.
- All other employees must have at least 1 hour of training every two years.

Discrimination and Harassment:

- If the employer has more than 50 employees, new supervisors must have 2 hours of training within 6 months.

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Supervisors


Who is Considered a “Supervisor”?

Under Federal law:

- Has authority to recommend actions that affect an employee’s employment status.
- Directs the employee’s daily work activities.
- Reasonably believes they have authority or to affect an employee’s position.

Under California law:

- Has authority to change an employee’s position; or
- Has responsibility to control employees or adjust grievances.

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Protected Classes

- Harassment on the basis of any protected class violates federal and state laws.
- Protected classes in California include
  - Age;
  - Race, color;
  - Gender;
  - Gender identity, or Gender expression;
  - Sex or Sexual Orientation;
  - Familial status;
  - Religion;
  - Genetic characteristics;
  - Ancestry;
  - Mental or physical disability;
  - Medical condition; and
  - Military status.

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Protected Classes

1. “Gender identity” is a person’s internal understanding of and identification with gender.

2. “Transgender” refers to a person whose gender identity differs from the person’s sex assigned at birth.

3. “Gender expression” is a person’s gender-related appearance or behavior.

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Protected Classes

Nonbinary is defined as:  
People with gender identities that fall somewhere outside of the traditional conceptions of strictly either female or male. People with nonbinary gender identities may or may not identify as transgender, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, Two Spirit, bigender, pangender, gender nonconforming, or gender variant. Nonbinary gender identities have been recognized by cultures throughout history and around the world, as well as by legal systems in the United States and other countries, medical authorities, and researchers. Studies show that nonbinary people face frequent discrimination, harassment, and violence in areas of life including education, employment, health care, and law enforcement.

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Protected Classes

Transgender is defined as:  
People whose gender identity or gender expression do not match the gender they were assigned at birth. Some transgender people have medically transitioned, undergoing gender affirming surgeries and hormonal treatments, while other transgender people do not choose any form of medical transition. There is no uniform set of procedures that are sought by transgender people that pursue medical transition. Transgender people may identify as female, male, or nonbinary, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, Two Spirit, bigender, pangender, gender nonconforming, or gender variant.

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Definition of Sexual Harassment

What is Sexual Harassment?  
1. Federal Civil Rights Act

- Unwelcome sexual advances;
- Requests for sexual favors;
- Other verbal or physical conduct of a sexual nature; and
- When submission to or rejection of this conduct explicitly or implicitly affects an individual's employment.

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Definition of Sexual Harassment

What is Sexual Harassment? (cont'd)  
2. California's Fair Employment and Housing Commission:

- Visual harassment;
- Verbal harassment;
- Physical harassment;
- Offering benefits in exchange for sexual favors;
- Threatening retaliation after receiving negative responses to sexual advances.

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Definition of Sexual Harassment

What is Sexual Harassment? (cont'd)  
3. The law distinguishes between:

- Unlawful harassment and legitimate conduct of superiors;
- Conduct that is inappropriate but not unlawful;
- Isolated offhand comments;
- Isolated incidents of non-offensive touching;
- Personality conflicts; and
- Isolated rude, insensitive or abrasive actions.

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Definition of Sexual Harassment

What is Sexual Harassment? (cont'd)  
4. Sexual harassment is based on a totality of the circumstances and considers:  
a. Unwelcomed conduct;  
b. Severe actions;  
c. A particularly offensive comment or some sort of unwelcomed physical touching;  
d. Pervasive; and  
e. Less serious conduct that happens frequently over a long period of time.

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True or False

1. The promise of reward or threat of punishment in exchange for sexual favors must be explicit in order to constitute quid pro quo sexual harassment. True/False  
2. An employee who gives in to the demand for sex in order to avoid negative consequences forfeits his or her claim for quid pro quo sexual harassment. True/False  
3. If the alleged harasser denies the charge, a claim for sexual harassment cannot be successful without a neutral witness or documentary evidence supporting the complainant's accusations. True/False

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Types of Sexual Harassment

There are Two Types of Sexual Harassment  
1. Quid Pro Quo  
2. Hostile environment

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**Types of Sexual Harassment**

3. Offensive to “reasonable person”

- a. Analyze if the victim was offended; and
- b. Excuses don’t matter “Nobody else minded;” “I was only joking.”



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**Types of Sexual Harassment**

4. Severe or pervasive

- a. Unreasonable interference with an employee’s work;
- b. Abuse;
- c. Intimidation;
- d. Usually requires repetition; or
- e. Can occur when supervisors or co-workers engage in offensive conduct.



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**Context of The Conduct**

Context of the conduct is important

- 1. Emphasis on the unwelcome nature of the conduct;
- 2. Intent/motivation of the accused is irrelevant;
- 3. Gender is irrelevant.



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True or False

1. To prove hostile work environment sexual harassment, the complaining party does not need to show that they suffered an adverse employment action. True/False

2. To prove hostile work environment sexual harassment, the complaining party must show that they were subjected to unwanted sexual attention that was both severe and pervasive. True/False

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Examples of Sexual Harassment

Conduct may be illegal if it happens often or the employee asks that it stop:

1. Occasional compliment to a co-worker on outfit;

2. Accidentally brushing up against a coworker;

3. Inviting to participate in non-work-related activities;

4. Public humiliation or embarrassment; or

5. Suggestive and unwelcome interactions on social media.

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Examples of Sexual Harassment

Inappropriate Conduct:

1. Verbal

a. Inappropriate demands for sexual favors;

b. Sexually graphic statements;

c. Demeaning or dirty jokes;

d. Description of an employee's anatomy or body in direct sexual or sexually suggestive terms

e. Sharing sexual experiences or fantasies or asking an employee about his or her private life, sexual history, or sexual practices

f. Epithets or slurs

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Examples of Sexual Harassment

Inappropriate Conduct:

1. Verbal (cont'd)

g. Unwanted invitations;

h. Repeatedly requesting a date;

i. Derogatory comments;

j. Constant subtle comments;

k. Hostile put-downs based on another's gender identity;

l. Use of nicknames or sexually patronizing terms;

m. Whistling.

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Examples of Sexual Harassment

Inappropriate Conduct:

2. Physical

a. Grabbing, patting, or touching a body part, particularly in an area that cannot be explained as innocent;

b. Encroaching upon an employee's physical space;

c. Blocking an employee's movement so that passing requires brushing up against another person;

d. Suggesting or requiring an employee to wear sexually suggestive clothing.

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Examples of Sexual Harassment

Inappropriate Conduct:

3. Visual

a. Derogatory gestures;

b. Forcing employee to observe objectionable materials of a sexual nature in the workplace;

c. Using sexually suggestive computer screen savers;

d. Cartoon or pictures that depict employees of either sex in a demeaning way;

e. Leering;

f. Suggestive and unwelcome texts or emails.

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Example #1

Blake, the sole proprietor of Acme Co., has decided to expand and compete for state contracts. Blake hires Jack, an independent contractor, to install a computer network. Jill responds to Blake's Craigslist ad for an office manager. Blake threatens to sue Jack for breach of contract unless Jack agrees to engage in sexual activity. Blake also tells Jill the job is hers if she agrees to have sex.



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Example #1

- Choose the best answer:
- A. Jack can't sue Blake because he is an independent contractor.
  - B. Jill can't sue Blake because Acme Co. has fewer than five employees.
  - C. Jack can't sue Blake because he is a man.
  - D. Jack and Jill can sue Blake for quid pro quo sexual harassment.
  - E. Jack can sue Blake for quid pro quo sexual harassment but Jill cannot.



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Example #2

Assistant Manager, Martin, took his secretary, Sally, out on a date. Afterwards, Sally told Martin that she did not want to see him outside of work again. Martin was upset but tried to maintain a good relationship with her by smiling, saying hello, and speaking with her and other employees. Sally asked Martin to leave her alone and told the Manager that Martin was harassing her.

Does Sally have a claim for Sexual Harassment?



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**Part 2:**  
**Investigation & Liability**

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**True or False**

1. The DFEH can seek injunctive relief to compel employers to take all reasonable steps to prevent unlawful discrimination without proving an underlying violation of FEHA. True/False

2. The employer’s duty to take immediate, effective action in response to a claim of sexual harassment only applies where there is a credible report or threat of unwanted physical contact. True/False

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**Investigation**

**Employer’s Duty**

1. Employers have a duty to investigate accusations/complaints.

a. Regardless if the employee wishes to make or proceed with a formal complaint. Includes informal complaints

2. Situations that trigger a duty to investigate without complaint:

a. Civil lawsuit alleging sexual harassment;

b. Charge of sexual harassment from a government agency;

c. Subtle complaints or remarks;

d. Observation by a co-worker, supervisor or other person;

e. Anonymous message or note of occurrence; or

f. Knowledge of sexual harassment.

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Investigation

What to do with a Complaint?

1. Immediately notify your supervisor;
2. Meet separately with Complainant, accused person, and witnesses;
3. Investigate;
4. Document thoroughly;
5. Take appropriate corrective action;
6. Ensure no retaliation.

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Investigation

Formal v. Informal Investigation

1. If complaint raised merits, conduct formal investigation
  - a. More complex situation;
  - b. Involves more than 2 employees;
  - c. Involves a pattern of conduct or single incident;
  - d. Need facts complaining employee cannot provide;
  - e. Need help of legal counsel or other professional.

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Investigation

Formal Investigation

1. Immediate and thorough Investigation
  - a. Gather information;
  - b. Use internal investigator;
  - c. Trained and experienced;
  - d. If possible, have male or female available for employee's comfort;
  - e. Have your attorney retain the investigator to gain privilege from discovery.

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### Investigation

#### 1. Immediate and thorough Investigation (cont'd)

##### f. Hire an outside investigator

- Attorney who conducts investigation may be called as witness, would not be allowed to represent the employer in court;
- May be subject to the requirements of the Fair Credit Reporting Act and State law governing "investigative consumer reports;"
- Entitles the subject of the harassment investigation to certain forms and notices.

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### Investigation

#### 1. Immediate and thorough investigation (con't.)

- g. Be fair and objective;
- h. Take all reasonable steps to maintain privacy of all parties;
- i. Interviews;
- j. Complainant first, then alleged harasser, then witnesses and others;
- k. Take good notes – record only the facts, not interpretations;
- l. Create a file and document companies response to the issue.

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### Investigation

#### 2. Limited Confidentiality

- a. Label the file "Confidential" and limit access;
- b. Confidentiality is not guaranteed;
- c. Certain parties must be informed of the complaint;
- d. Especially the accused and the witnesses.

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### Investigation

3. Interim Actions Pending Conclusion of Investigation
  - a. May place accused on a leave of absence, with or without pay, depending on the severity of allegations;
  - b. May move accused to different work area;
  - c. Inform complaining party of actions taken.

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### Investigation

4. Decision Based on Investigation
  - a. Examine objective facts and assess credibility of witnesses.
  - b. It is okay to make credibility decisions.
  - c. Whether the law was violated is a legal conclusion that should be made by legal counsel.
  - d. Determine the discipline.
  - e. If the case involves a REALTOR® association member, discipline may include filing a Professional Standards complaint.

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### Investigation

#### REALTORS® ASSOCIATION MEMBERS

- REALTORS® Associations bylaws clearly state that the association will not tolerate sexual or other inappropriate harassment of staff.
- New California laws impose liability for sexual harassment that occurs in the course of business, service, or professional relationships, including REALTORS®.
- California laws made proving sexual harassment against REALTORS® easier as the legislature eliminated the requirement that a plaintiff must be unable to terminate the relationship.
- A REALTOR® or MLS member may face a hearing, fine up to \$15,000, or other punishments including publication on the CAR website.
- Under extreme circumstances, an ethics violation under Article 10 violation could be filed for discrimination based on gender.

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Investigation

Communicate Investigation Results

1. Meet with victim

a. Describe and discuss the investigation;

b. Explain what action will be taken;

c. Advise what to do if there is any retaliation;

d. Communicate expectation of confidentiality;

e. Restore lost employment, benefits, or opportunities.

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Investigation

Communicate Investigation Results (cont'd)

2. Follow-up with Victim

a. Confirm there has been no retaliation;

b. Confirm that harassment has ended.

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Investigation

Communicate Investigation Results (cont'd)

3. Meet with Accused

a. Explain briefly the complaint;

b. Explain the investigation and conclusion;

c. Explain what disciplinary actions are being taken;

d. Give employee an opportunity to provide any additional relevant information;

e. Advise employee who to contact for any future questions;

f. Remind the employee that retaliation will not be tolerated.

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Example #3

Over the last six months, Frieda’s supervisor comes into her office every morning to say “Good morning, Gorgeous!” or “Lookin’ good, Sexy!” His statements make Frieda uncomfortable but she has not told him to stop for fear of retaliation. Does Frieda have a claim for Sexual Harassment?



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Practical Examples

Sexual Orientation Harassment

- 1. Lowering performance evaluation scores because of an employee’s sexual orientation;
- 2. Giving promotions, bonuses, or commendations only to employees of a certain sexual orientation;
- 3. Making insulting or threatening remarks towards an employee because of his or her sexual orientation;
- 4. Making comments about a sexual orientation in a joking manner;
- 5. Threatening or engaging in physical contact and/or violence towards an employee solely because of his or her sexual orientation.

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Practical Examples

Gender Expression/Identity Harassment

- 1. Treating an employee differently from other employees because of how the employee chooses to identify and/or express his or her gender;
- 2. Refusing to acknowledge the name(s) and/or pronoun(s) (e.g., he/she/it) an employee has requested to be addressed by;
- 3. Failing to promote an employee solely based on his or her gender identity and/or expression choices;
- 4. Threatening an employee solely because of his or her gender identity and/or expression choices.

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**Practical Examples**

Retaliation

1. Lowering an employee's performance evaluation scores because he or she filed a harassment complaint and/or cooperated in an investigation;
2. Transferring an employee to a less desirable position and/or location because he or she filed a harassment complaint and/or cooperated in an investigation;
3. Demoting an employee for complaining about harassment he or she is enduring from co-workers;
4. Ignoring backlash an employee is receiving as a result of cooperating in a harassment investigation; or
5. Failing to adequately protect an employee that has been the victim of harassment.

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**Practical Examples**

Abusive Conduct

1. Insulting an employee because of their dress or appearance;
2. Office pranks that leave an employee feeling harassed, humiliated, embarrassed, unable to work, or helpless;
3. A large, muscular employee using his or her size and strength to intimidate smaller employees;
4. A supervisor unreasonably criticizes his or her subordinates.

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**Who is Liable?**

Under California law, the following can be liable:

1. Employers;
2. Prospective Employers;
3. Supervisors;
4. Subordinates;
5. Co-Workers;
6. Individual Employees;
7. Moreover, employers are strictly liable for unlawful harassment by supervisors and agents.

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### Remedies

For Those Who Have been Sexually Harassed:

1. Document in writing each incident of harassment, noting the date, time, and people involved;
2. File a written complaint in accordance with the company's sexual harassment policy;
3. File a complaint with the Department of Fair Employment and Housing and the Federal Equal Employment Opportunity Commission. You don't need a lawyer to take this step.

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### Remedies

For Those Who Have been Sexually Harassed  
(cont'd):

4. Hire a private attorney to represent your interests
5. If you are the victim of sexual assault:
  - a. Call 911 if you are in a life-threatening situation;
  - b. Report the incident to the local police;
  - c. See a healthcare provider as soon as possible;
  - d. Call a crisis hotline: 800-656-HOPE (4673).

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### Example #4

Matthew, a hiring manager, hired Tammy from a temp agency. Matthew later discovers Tammy is trans and her former name was "Thomas." Matthew tells the agency not to send any more workers who are trans or who don't look like "normal" men or women. He refuses to call Tammy by her new name and pronoun.

Does Tammy have a claim  
for Harassment?



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**Part 3:  
Prevention & Retaliation**

**Prevention**

**Duty to Prevent**

1. Employers have a duty to prevent sexual harassment;
2. Employers are required to obtain an information sheet from FEHA and distribute the sheet to employees;
3. Employers may satisfy the distribution requirement if they provide equivalent information through an alternate avenue;
4. Must take all reasonable steps necessary to prevent harassment from occurring including:
  - a. Developing methods to train/educate employees;
  - b. Establish and communicate a strict zero tolerance policy;
  - c. Establish procedures for employees to make complaints;
  - d. Establish policies and procedures for prompt investigation of all complaints and remedies.

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**Prevention**

**What Should Employer's Do to Prevent Sexual Harassment?**

1. Employer's Written Policies
  - a. Adopt and continually update Sexual Harassment Prevention Policy;
  - b. Communicate the policy;
  - c. Maintain and update policy in the Employee Handbook;
  - d. Require employees to sign an acknowledgment that they received the policy;
  - e. Keep a copy of the receipt signed by the employee in the personnel file;
  - f. Post a government issued poster.


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Prevention

What Should Employer's Do to Prevent Sexual Harassment (cont'd)

2. Sexual Harassment Policy should include:

- a. Language of strong disapproval of such conduct;
- b. Procedure for affirmatively raising the subject with all supervisors and non-supervisors;
- c. Explain sanctions;
- d. Advise employees of right to raise issues;
- e. Provide and explain procedure that encourages victim to come forward;
- f. Provide method to complain without going to offending supervisor.

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Prevention

What Can Employee's Do to Prevent Sexual Harassment?

- 1. Follow Employer's Written Policies;
- 2. Attend Sexual Harassment Prevention Training;
- 3. Respect Fellow Co-workers;
- 4. Refrain from conduct or language that may be considered inappropriate;
- 5. Communicate/Report allegations of sexual harassment.

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Prevention

How can you help establish appropriate boundaries?

1. Avoid the following:

- a. Comments about another's looks, clothing or body;
- b. Repeated requests for dates;
- c. Invitations to participate in non-work-related activities;
- d. E-mails unrelated to work or academic tasks;
- e. Comments such as, "Hey, give me a smile."
- f. Public humiliation or embarrassment.

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Prevention

1. Avoid the following: (cont'd)

- g. Leaning over and invading another's space, or unwanted touching;
- h. Offering transportation or financial assistance;
- i. Interactions on social media;
- j. Meeting alone with an individual behind closed doors;
- k. Inviting a sole individual to your residence
- l. Calling someone by a nickname rather than their given name.

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Prevention

2. Beware of Workplace Romances

- a. Potential for problems
  - Consensual relationships among employees are a common source of sexual harassment charges;
  - Problems when one party claims other is harassing them; may contend that relationship was never truly consensual;
  - Reduced productivity and morale;
  - Gossip, disruptions and distractions.
- b. Sexual Favoritism
  - Hostile Work Environment if employees feel there is favoritism displayed between the employees in the romantic relationships.
  - Coworkers gained a sufficiently widespread professional advantage by being in the romantic relationships in the workplace.

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Prevention

2. Beware of Workplace Romances (cont'd)

- c. Employer may implement policies which prohibit dating between managers and subordinates.
- d. Treat employees equally regardless of position or gender.

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**Retaliation**

- Retaliation is prohibited
- 1. Complaining about harassment is a protected activity;
  - 2. Retaliation against the victim or anyone else who cooperates with an investigation will not be tolerated and is not permissible under California law.

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**Summary**

- Changing Times
- 1. Reasonableness of Complaint
    - a. Totality of Circumstances
  - 2. Zero Tolerance
    - a. Zero tolerance policy for any form of harassment in the workplace;
    - b. All allegations of harassment shall be seriously and promptly investigated;
    - c. Any person found to have harassed another will face disciplinary action.

TYLER & BURSCH, LLP  
LAWYERS & ADVISORS

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**THANK YOU FOR YOUR ATTENTION**

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LAWYERS & ADVISORS

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