Session 11
2:00pm-3:00pm

Investigations in the Era of Diversity and Inclusion: New Claims, New Dynamics

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Bio

Firm Website

Included in this Packet

PDF of PowerPoint Presentation
Investigation Checklist
DFEH Workplace Harassment Guide
DFEH Sexual Harassment Fact Sheet

Zoom Session Link for December 8

https://us02web.zoom.us/meeting/register/tZwvfuf2trDgqGNXR_Fe5NU7C_6Je52dVYpzk
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OVERVIEW

- Investigations are not just an obligation.
- They are an opportunity for the Company:
  - to address a dispute before it develops into a major problem
  - to advise and correct problem behavior
  - to understand and document a witness’s account of events
  - to collect documents, evidence, and testimony
  - to demonstrate Company lawfulness and compliance with policies
  - to improve employee morale by showing responsiveness & fairness
WHAT DOES DEI MEAN IN THE WORKPLACE?

▪ Diversity – the presence of differences within the workplace, based on various aspects of life that comprise an individual. These can include race, gender, religion, disability, age, sexual orientation, and more.

▪ Equity – ensures that everyone has access to the same treatment, opportunities, and advancement. Aims to remove barriers that prevent full participation and enjoyment of these benefits by some groups.

▪ Inclusion – Acknowledgment and validation of diversity amongst employees, and engagement and recognition of an individual which helps provide a sense of belonging.

A NEW ERA OF DIVERSITY, EQUITY & INCLUSION

▪ DEI – increasing focus in popular culture, protest, the news, amongst employees, and company management

▪ Employees are aware of potential DEI and discrimination issues like never before in history.
EXAMPLES OF NEWLY-HIGHLIGHTED AREAS OF DIVERSITY AND SENSITIVITY

- Pronouns: they/them, she/her, he/him, etc.
- Group definitions: BIPOC, LGBTQIA+
- Branding: Be “woke,” don’t be “tone deaf”

NEW LEGAL PROTECTIONS IN THE DEI ERA

- Newly-protected classes (transgender, natural hair, lactation/pregnancy)
- California Fair Pay Act amendments - “substantially similar work, when viewed as a composite of skills, effort, and responsibility, and performed under similar working conditions”
- Composition of company boards and upper management – SB 826
LEGAL PROTECTIONS RELEVANT TO BLM & MASS PROTEST

▪ Labor Code section 1101: “No employer shall make, adopt, or enforce any rule, regulation, or policy … controlling or directing, or tending to control or direct the political activities or affiliations of employees.”

▪ Labor Code section 1102: “No employer shall coerce or influence or attempt to coerce or influence [its] employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.”

▪ Labor Code section sections 96(k) & 98.6: An employer shall not “in any manner discrimination, retaliate, or take any adverse action against any employee or applicant” because the employee or applicant engaged in any “lawful conduct occurring during nonworking hours away from the employer’s premises.”

NEW TERMINOLOGY FOR THE DEI ERA

▪ Implicit biases – attitudes or stereotypes that affect our behavior in an unconscious matter

▪ Structural racism – an array of dynamics that routinely advantage certain racial groups while producing cumulative and chronic adverse outcomes for people of color

▪ Microaggressions – verbal, behavioral, or environmental slights, often unintentional or automatic, that occur in brief instances on a daily basis and communicate hostile, derogatory or negative perceptions
WHAT DOES THE DEI ERA MEAN FOR INVESTIGATIONS?

- Investigations require more skill
- Investigations require more awareness
- Investigation conclusions may be less clear-cut
- Investigations require more documentation
- Investigations may be more visible
- Investigations may become more common
- Investigations may lead to more follow-up and company change

THE BASICS OF A FAIR INVESTIGATION

- An employer must investigate claims of harassment or discrimination, even if alleged harasser denies the claim, and/or the claimant wishes to drop the matter
- Investigator should be neutral, fair, and objective—HR, or a qualified outside investigator
- Interview the claimant
  - Find out exactly what the complaining employee claims happened
- Interview the accused
  - Determine whether the accused admits or denies the alleged conduct
  - Allow the accused to give their account of events
- Interview any other witnesses identified by the claimant or the accused
  - Assure all witnesses that they will not be retaliated against for cooperating in the investigation
  - Consider having witnesses sign a witness statement
- Gather any available documentary evidence (e.g., emails, text messages, security videos)
- Document conclusions
STEP 1: INVESTIGATION PLANNING

- Determine if any steps need to be taken immediately (suspension, transfer, notices?)

- Determine who is going to conduct the investigation.

- Determine which witnesses will be interviewed, and in what order.

- Gather records, documents, or evidence – before or during interviews

- Set a target date to complete the investigation.

CONSIDERATIONS IN PLANNING

- Investigations are a choice.

- Investigations require some advance planning and thought

- But they also must occur reasonably promptly after the claims are made

- Investigators may have to balance these two objectives, and multi-task by gathering information and documents during interviews.

- Investigators should be sensitive to DEI issues in making decisions in who will conduct the investigation, the order of witnesses, and the response
BALANCING OTHER HR ISSUES

- Performance: A complaint may be made during a Performance Improvement Plan process, or on the eve of a planned personnel action such as termination, transfer, demotion, or suspension.

- HR Issues: A complaint may be made in a meeting with HR intended to cover other issues such as poor conduct of complaining employee.

- Termination: A complaint may be made in an exit interview, or immediately prior to/after termination.

WHEN TO CALL IN OUTSIDE HELP

- Not every investigation should be handled internally.

- Outside help may be recommended if investigation is complex, high-stakes, high-level company executive (or HR) is accused, multiple parties involved, legal claims are anticipated. Or if there are other considerations (such as potential retaliation or DEI accusations), or other reasons why impartiality or prompt and full investigation could not be guaranteed internally.

- Any outside investigators must be qualified as a licensed private investigator or attorney. Cal. Bus. & Prof. Code Sec. 7520 et seq.

- Communications with attorneys for legal advice are privileged.
CONSULTING WITH LEGAL

- You will likely want to consult with the Company’s Legal Department or outside attorneys on complaints or investigations involving:
  - An allegation of unlawful harassment, discrimination, or retaliation based on a protected category
    - (Race, sex, age, national origin, color, religion, sexuality, gender, disability, and other categories protected by state laws)
  - Whistleblowing or allegation of unlawful activity such as:
    - Failure to comply with lending industry regulations or laws
    - Failure to comply with safety or health rules or laws
    - Failure to pay wages, overtime, or provide meal or rest breaks
  - Other claims of wrongful conduct or ethical violations that could lead to a claim or a discovery of unlawful conduct
  - Claims made during/on the eve of a planned personnel action
  - Claims that are related to or pertain to current or past legal matters
  - Other claims that involve legal issues or require legal input or advice

STEP 2: INTERVIEWS

- Are there information, policies, or documents needed to prepare for the interview?

- Plan how to open and close each interview.

- Plan what to ask the witness. Use the funnel method of questioning.

- What questions should be anticipated from the witness?
INVESTIGATION AND CONFIDENTIALITY

- Notify both claimant and accused of limited confidentiality
- Absolute confidentiality is impossible to fully investigate a claim
- Be discrete and share information with others on a "need to know" basis only
- Keep records of investigation in a separate file. Only include a written recommendation and documentation of disciplinary action, if any, in the personnel file of any individual who is disciplined as a result of the investigation.

INTERVIEWING WITNESSES: PURPOSE

- Gather facts objectively without bias
- Ask questions fairly and without bias, directed to facts
- Discover leads towards new evidence or information to explore in documents or with witnesses
- Establish links which connect or verify information suggested by other witnesses or documents
- Assess when witnesses are being truthful or deceptive
- Solicit admissions
- Discover the truth
INTERVIEWING WITNESSES: CONDUCT

- The goal of the interview is to get the witness to talk
- Use medium, conversational tone and speech
- Be present, engaged, open listening
- Avoid skeptical expressions or negative gestures – be aware of DEI issues
- Actively observe for indicators of truth or deception
- Increase facilitators of conversation and reduce inhibitors. Make witnesses feel comfortable to trust in the process and share information.
- Plan conversations to avoid time pressure or similar threats

INTERVIEWING WITNESSES: STYLE OF QUESTIONING

- Most productive interviews use both non-directive and directive questions to gather information and build upon information already known or provided
- Directive interview: leading questions, suggesting or incorporating known information, or leading the bull by the horns
- Non-directive interview: asks open questions and gives the witness a chance to talk
- Consider the order in which you use directive and non-directive questions based on information already provided to you
INTERVIEWING: FUNNEL METHOD

INTERVIEWING: QUESTION TYPES

- Open-ended questions – encourage a narrative
  - Tell me what happened between you and Maria on Thursday?
- Expansion questions – build from open-ended questions
  - After she left your cubicle, then what happened?
- Close-ended questions - nail down specific facts
  - What were the names of the other people who heard what she said?
- Leading questions – arise from your information and believed facts
  - So when Maria said “___” to you, did you understand her to be referring to what happened on the sales call earlier that day?
- Final questions – pushes things to the witness to answer
  - Do you feel like this was a comment on your age, or because of the mistakes in the sales chart?
  - Why do you think it was because of your age?
STRATEGIC USE OF EVIDENCE

GATHERING DOCUMENTS & MATERIAL

- Investigators should take and keep notes documenting all complaints and interviews.
- Investigators should gather documents and material while investigating:
  - That are specifically mentioned by witnesses.
  - That are statements or notes of events as they happened.
  - That may establish an important chronology of events.
  - “Are there any emails, notes, documents, texts, or social media messages that might show or relate to this?”
- Investigators should ask for documents during interviews. Investigators may wish to delay certain interviews to review documents first.
GATHERING ELECTRONIC MATERIAL

- Company electronic systems, email accounts, company-issued cell phones, and other company documents are company property.
- Personal social media is not company property, but misuse may be a violation of company policy (i.e. harassing another employee through social media).
- Cal. Labor Code sec. 980: An employer shall not require or request an employee/applicant to: divulge social media, access social media in the employer’s presence, or disclose a username/password to social media, UNLESS:
  - (a) it is a non-mandatory request to divulge media reasonably believed to be relevant to an investigation of claims of employee misconduct/violations of law, and used only for that purpose, or
  - (b) it is a request that the employee disclose a username/password for the purpose of accessing an employer-issued electronic device.

STEP 3: ANALYSIS AFTER EACH INTERVIEW

- What consistencies/inconsistencies are there in each witness’s testimony?
- What does the witness’s responses and demeanor tell you?
- What is your overall credibility determination of the witness?
- What more information/documents is wanted?
- Are any questions unanswered? What follow-up is triggered? Any need to re-interview?
STEP 4: DOCUMENTATION OF INTERVIEWS

- Document the interview
- Compile notes, records and evidence for the investigation file.

STEP 5: COMPILING THE REPORT

- Based on the evidence, determine whether the alleged conduct occurred and whether it violated a company policy.
- Document the conclusions and findings that were reached. These should not be legal conclusions.
- List facts, evidence, and credibility determinations to support each conclusion.
- The memo should be impartial with a minimum of your involvement. Do not include your opinions
- Should all issues go into the same report, or should multiple reports be generated?
- List recommendations regarding appropriate actions and resolution.
RECOMMENDATIONS FOR IMPROPER CONDUCT

- Even if no violation is discovered, an accused employee can be provided and reminded of company code of conduct, and policies on professionalism, DEI and EEO.

- Discipline employees who have violated company policy or acted inappropriately

- Do not transfer a victim to a less desirable position.

- If improper conduct is discovered, a remedy may be dependent on many factors

- Train on company policy to affected employees.

STEP 6: INVESTIGATION CONCLUSION

- Inform both parties of your determination, and give them an opportunity to appeal and to present additional evidence.

- Address any ongoing issues raised during the investigation.

- Undertake any counseling, disciplinary or other action.

- Are there other employees to follow up with?

- Communicate (again) that there should be no retaliation

- Are there any company takeaways for management/HR?

- Is there a need for further exploration or communications, management, or DEI training?
End

- Check your materials for:
  - Investigation Checklist
  - DFEH Workplace Investigations Guide
  - State-required poster/brochure with investigation policy

- Thank you!
# WELU 2020 - Workplace Investigations Planning Checklist

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## 1. Step 1 – Setting Up The Investigation
   a. Determine if any steps need to be taken immediately (suspension, transfer, notices?)
   b. Determine who is going to conduct the investigation. Will it be handled internally or through qualified outside investigator?
   c. Determine which witnesses you will interview, and in what order.
   d. Gather records, documents, or evidence you need.
   e. Set a target date to complete your investigation.

## 2. Step 2 – Interviews
   a. Are there information, policies, or documents you need to prepare for the interview?
   b. Plan how you will open and close each interview.
   c. What do you plan to ask the witness? Use the funnel method of questioning.
   d. What questions/sensitive issues should you anticipate from the witness?

## 3. Step 3 – Analysis After Each Interview
   a. What consistencies/inconsistencies are there in the witness’s testimony?
   b. What do the witnesses’ responses and demeanor tell you?
   c. What is your overall credibility determination of each witness?
   d. What more information/documents would you want?
   e. Are any questions unanswered? What follow-up is triggered? Any need to re-interview?

## 4. Step 4 – Documentation of Interviews
   a. Compile notes, records and evidence for the investigation file.

## 5. Step 5 – Compiling the Report
   a. Document the conclusions you have reached. These should not be legal conclusions.
   b. List facts, evidence, and credibility determinations to support each conclusion.
   c. Should all issues go into the same report, or should multiple reports be generated?
   d. List your recommendation regarding appropriate actions and resolution.

## 6. Step 6 – Investigation Conclusion
   a. Communicate findings to the Complainant.
   b. Communicate findings to the Accused.
   c. Are there other employees to follow up with?
   d. Communicate that there should be no retaliation.
   e. Address any ongoing issues raised during the investigation.
California law (called the Fair Employment and Housing Act or FEHA) prohibits discrimination, harassment and retaliation. The law also requires that employers “take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)). The Department of Fair Employment and Housing (DFEH) is the state’s enforcement agency related to the obligations under the FEHA.

California’s Fair Employment and Housing Council (FEHC) enacted regulations in 2016 to clarify this obligation to prevent and correct wrongful behavior. This document was produced by the DFEH to provide further guidance to California employers.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

- A clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months). The regulations list the required components of an anti-harassment policy at 2 CCR §11023.

- Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.

- Training for supervisors and managers (two-hour training is mandated under two laws commonly referred to as AB 1825 and AB 2053, for more information on this see DFEH training FAQs).

- Specialized training for complaint handlers (more information on this below).

- Policies and procedures for responding to and investigating complaints (more information on this below).

- Prompt, thorough and fair investigations of complaints (see below).

- Prompt and fair remedial action (see below).
IF I RECEIVE A REPORT OF HARASSMENT OR OTHER WRONGFUL BEHAVIOR, WHAT SHOULD I DO?

You should give it top priority and determine whether the report involves behavior that is serious enough that you need to conduct a formal investigation. If it is not so serious (for example, an employee’s discomfort with an offhand compliment), then you might be able to resolve the issue by counseling the individual. However, if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate the matter to make a factual determination about what happened. Once your investigation is complete, you should act based on your factual findings.

An investigation involves several steps and you need to consider a variety of issues before you begin your work. The following section will address many of those issues.

WHAT ARE THE BASIC STEPS REQUIRED TO CONDUCT A FAIR INVESTIGATION?

A phrase that you might see related to investigations is “due process.” Due process is simply a formal way of saying “fairness” – employers should be fair to all parties during an investigation. From a practical perspective, this means:

- Conduct a thorough interview with the complaining party, preferably in person. Whenever possible, the investigation should start with this step.

- Give the accused party a chance to tell his/her side of the story, preferably in person. The accused party is entitled to know the allegations being made against him/her, however it is good investigatory process to reveal the allegations during the interview rather than before the interview takes place. It may not be necessary to disclose the identity of the complaining party in some cases. Due process does not require showing the accused party a written complaint. Rather, it means making the allegations clear and getting a clear response.

- Relevant witnesses should be interviewed and relevant documents should be reviewed. This does not mean an investigator must interview every witness or document suggested by the complainant or accused party. Rather, the investigator should exercise discretion but interview any witness whose information could impact the findings of the investigation and attempt to gather any documents that could reasonably confirm or undermine the allegations or the response to the allegations.

- Do other work that might be necessary for you to get all the facts (perhaps you need to visit the work site, view videotapes, take pictures, etc.).

- You should reach a reasonable and fair conclusion based on the information you collected, reviewed and analyzed during the investigation.
**DO I HAVE TO KEEP ALL INFORMATION FROM AN INVESTIGATION CONFIDENTIAL?**

You need to look at confidentiality from two sides – the investigator’s and the employees’. The first question is how confidential the investigator (internal or external) will keep the information obtained; the second is whether an employer can require that employees keep information confidential.

- **Can the investigator keep the complaint confidential?**

  The short answer is no. Employers can only promise *limited* confidentiality – that the information will be limited to those who “need to know.” An investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation in order to complete the investigation and take appropriate action. It is not possible to promise that a complaint can be kept entirely “confidential” for several reasons:

  1. If the complaint is of potential violation of law or policy, the employer will need to investigate, and in the process of investigating it is likely that people will know or assume details about the allegations, including the identity of the person who complained. This is true even when the name of the complainant is kept confidential since allegations are often clear enough for people to figure out who complained about what.
  2. The individual receiving the complaint will usually have to consult with someone else at the company about what steps to take and to collect information about whether there have been past complaints involving the same employee, etc. That means the complaint will be discussed with others within the organization.
  3. The company may need to take disciplinary action. Again, while the identity of the person who brought the complaint may in some cases be kept confidential, the complaint itself cannot be.

- **Can I tell employees not to talk about the investigation?**

  This is a complicated issue. Managers can, and should, be told to keep the investigation confidential. However there have been court rulings that say it is inappropriate for an employer to require that employees keep the information secret, since employees have the right to talk about their work conditions. There are exceptions to this. If you want to require confidentiality, you might want to check with an attorney about when it is appropriate and how to do so.

**HOW QUICKLY DO I NEED TO BEGIN AND FINISH MY INVESTIGATION?**

The investigation should be started and conducted promptly, as soon as is feasible. Once begun, it should proceed and conclude quickly. However, investigators also must take the time to make sure the investigation is fair to all parties and is thorough. Some companies set up specific timelines for responding to complaints depending on how serious the allegations are (for example, if they involve claims of physical harassment or a threat of violence, act the same day as the complaint is received). If the allegation is not urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation in a few weeks (although that depends on several factors, including the availability of witnesses).
A prompt investigation assists in stopping harassing behavior, sends a message that the employer takes the complaint seriously, helps ensure the preservation of evidence (including physical evidence such as emails and videos, and witnesses’ memories), and allows the employer to fairly address the issues in a manner that will minimize disruption to the workplace and individuals involved.

**WHAT ARE SOME RECOMMENDED PRACTICES FOR CONDUCTING WORKPLACE INVESTIGATIONS?**

**IMPARTIALITY**

The investigation should be impartial. Findings should be based on objective weighing of the evidence collected. It is important for the person conducting the investigation to assess whether they have any biases that would interfere with coming to a fair and impartial finding and, if the investigator cannot be neutral, to find someone else to conduct the investigation.

Even if investigators determine they can be neutral and impartial, they must evaluate whether their involvement will create the perception of bias. A perception of bias by the investigator will discourage open dialogue with all involved parties. For example, in a case in which the investigator has a personal friendship with the complainant or accused, either actual or perceived, the investigator may need to recuse him- or herself to avoid the appearance of impropriety. It is generally a bad idea to have someone investigate a situation where either the complainant or accused party has more authority in the organization than the investigator.

**INVESTIGATOR QUALIFICATIONS AND TRAINING**

**Qualifications:**

The investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to harassment, investigative technique relating to questioning witnesses, documenting interviews and analyzing information. He or she should have sufficient communication skills to conduct the interviews and deliver the findings in the written or verbal form. For more complex and serious allegations it is also important for the investigator to have prior experience conducting such investigations.

For workplace investigations, employers may utilize an employee as an investigator or hire an external investigator. In instances of harassment allegations, the employee investigator is often someone from human resources. In California, external investigators (those who are not employed by the employer) must be licensed private investigators or attorneys acting in their capacity as an attorney (See Business and Professions Code Section 7520 et seq.)

**Training:**

There is no one standard training program for workplace investigators. Internal investigators usually obtain training by professional organizations for HR professionals (such as The Society for Human Resource Management (SHRM), Northern California Human Resource Association (NCHRA), Professionals in Human Resource Association (PIHRA), professional
organizations for workplace investigators (such as the Association of Workplace Investigators - AWI) and enforcement agencies (such as DFEH or EEOC). Many law offices and vendors that provide harassment prevention training also provide training for investigators. At a minimum, training should cover information about the law shaping investigation recommended practices, how to determine scope (what to investigate), effective interviewing of witnesses, weighing credibility, analyzing information and writing a report. An introductory training program typically lasts a full day (some training is longer) and includes skill-building exercises.

**TYPE OF QUESTIONING**

Investigations should not be interrogations. Neither the complainant nor the accused party should feel they are being cross-examined. Studies have shown that open-ended questions are better at eliciting information while not causing people to feel attacked. Investigators should ask open-ended questions on all areas relevant to the complaint to get complete information from the parties and witnesses.

**MAKING CREDIBILITY DETERMINATIONS**

Making a determination:

If there is no substantial disagreement about the factual allegations it may not be necessary to make a credibility determination. However, many investigations require a credibility determination, including the classic “he said/she said” situation, and it is up to the investigator to make this determination. An investigator can still reach a reasonable conclusion even if there is no independent witness to an event. In most cases, if the investigator gathers and analyzes all relevant information, it is possible to come to a sensible conclusion.

**He said/she said situations:**

It is not uncommon for there to be no direct witnesses to harassment. Yet there may be other evidence that would tend to support or detract from the claim. For example, a complainant who complains about harassment may have been seen to be upset shortly after the event, or may have told someone right after the event. This would tend to bolster his or her credibility. On the other hand, it would tend to bolster the accused party’s credibility if the investigator learned that the complainant complained many months after sexual joking with a supervisor, was just given a negative performance review, and told a co-worker that he or she could use the joking against the supervisor in the future. In other cases documents such as emails or texts might bolster or reduce a witness’s credibility.

Even if there is no evidence other than the complainant’s and accused party’s respective statements, the investigator should weigh the credibility of those statements and make a finding as to who is more credible. The investigator can utilize the credibility factors stated below.
Credibility factors:

Credibility factors include the following (these are also referred to in statutes and enforcement agency guidance):

1. Inherent plausibility – this refers to whether the facts put forward by the party are reasonable: whether the story holds together. In other words, ask yourself whether it is plausible that events occurred in the manner alleged.
2. Motive to lie (based on the existence of a bias, interest or other motive) – this refers to whether a party has a motive to be untruthful.
3. Corroboration – this refers to whether a direct or indirect witness corroborates some or all of the allegations or response to allegations.
4. Extent a witness was able to perceive, recollect or communicate about the matter – this refers to whether the witness could reasonably perceive the information reported (in terms of where they were, what else was happening, etc.)
5. History of honesty/dishonesty. Although investigations are not meant to make character judgments about the parties (whether they are a “good person”), if an individual is known to have been dishonest, this can weigh against his/her credibility.
6. Habit/consistency – this refers to allegations of a behavior that someone is known to do on a regular basis (such as hugging all female employees in greeting).
7. Inconsistent statements – this refers to one individual giving statements that are inconsistent in a way that is not easily explained.
8. Manner of testimony – such as hesitations of speech and indirect answers (especially when the witness has given direct answers to foundational questions.)
9. Demeanor – experts caution against using demeanor evidence as most people cannot effectively evaluate truthfulness from an individual’s demeanor. Demeanor can be used as a credibility factor, but investigators should apply it with caution and understand the pitfalls of relying on demeanor when making a finding. To the extent possible, your conclusions should be based on an analysis of the objective evidence.

Burden of Proof

Investigators should make findings based on a “preponderance of the evidence” standard. This is the standard that civil courts use in discrimination and harassment cases. This standard is also called “more likely than not” – the investigator is making a finding that it more likely than not that the conduct alleged occurred, or more likely than not that it did not occur. Some workplace investigators make the mistake of applying a higher burden of proof, such as a “clear and convincing” standard or a “beyond a reasonable doubt” standard. Beyond a reasonable doubt is the standard used in criminal law, where a defendant is considered innocent until proven guilty and the consequence of guilt is a loss of freedom. Applying such a standard in a workplace investigation creates an unrealistic expectation about the level of proof needed to make a decision. Even a “clear and convincing” standard is a higher standard than should be expected since it is a higher standard than a civil court would use to determine liability. Some people describe a preponderance of the evidence standard as “fifty percent plus a feather.”
DO NOT REACH LEGAL CONCLUSIONS

It is considered a recommended practice for investigators to reach factual conclusions, not legal conclusions. Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy. Note that violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.

Conclusions should state, for example:

Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.

Some investigators (typically internal investigators) are also expected to decide whether a policy was violated. External investigators are usually not asked to make this determination since the employer is often in a better position to interpret its own rules. In the above example, if the investigator were to make a policy violation determination the findings would also include:

It is further found that Mr. Foster violated the company's anti-harassment policy which prohibits telling sexually-explicit jokes in the workplace.

In the event the investigation does not uncover evidence to support the allegations, the conclusion should state that fact, such as:

Mr. Jones's allegations against Mr. Foster are not supported by a preponderance of the evidence. This is because no witness recalls hearing the jokes described by Mr. Jones, even though they were present for the meetings in question. These witnesses appeared credible. They provided consistent information and appeared to have no bias for or against either party.

DOCUMENTATION

Investigators should carefully and objectively document witness interviews, the findings made and the steps taken to investigate the matter. Investigators have different methods of documenting interviews, including taking notes (handwritten or on a computer), drafting statements for witnesses to sign, obtaining witness statements (written by the witness), or audio recording. There are pros and cons to each method and any can be acceptable so long as the information gathered is reliable and thoroughly documented and the documentation is not altered. It is also advisable to be consistent in the way you decide to document your interviews (unless there is a good reason to change your usual practice). It is considered a recommended
practice to retain all documentation. Some investigators type up handwritten notes so they are legible. However, the handwritten notes should also be retained.

**SPECIAL ISSUES**

**What to do if the target of harassment asks the employer not to do anything.**

It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential or says that he/she will “solve the problem” with no involvement by the company. Indeed, this is one of the primary reasons why employers should not promise “complete” confidentiality. If the complaint involves relatively minor allegations and the complainant wants to handle the situation him/herself, the complainant can be coached as to how to do so, however the employer should follow up and assure this has occurred and the harassment has stopped. If the allegations are more serious the employer will need to know if they occurred so that appropriate action can be taken. In those cases it is not acceptable to have the complainant handle the matter alone.

**Investigating Anonymous Complaints**

Anonymous complaints should be investigated in the same manner as those with a complainant who identifies him/herself. The method will depend on the details provided in the anonymous complaint. If the complaint is sufficiently detailed the investigation may be able to proceed in the same manner as any other complaint. If the information is more general, the employer may need to do an environmental assessment* or survey to try to determine where there may be issues. However, the fact that the complaint is anonymous is not a reason to ignore the complaint.

* An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual. For example, it might mean interviewing all the employees in a work group about how they interact, if they have experienced or witnessed any behavior that has made them uncomfortable, etc.

**Retaliation**

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Employers should tell complainants and witnesses that retaliation violates the law and their policies, should counsel all parties and witnesses not to retaliate, and should be alert to signs of retaliation. Retaliation can take many forms. In addition to the obvious, such as terminations or demotions, retaliation could take the form of changes in assignments, failing to communicate, being ostracized or the subject of gossip, etc.

Retaliation can occur at any time, not only right after an incident is reported or an investigation is started. It is good practice to check back with a complainant after an investigation is completed to ensure that the employee is not experiencing retaliation, no matter whether the allegations were determined to be correct.
IMPLEMENTING EFFECTIVE REMEDIAL MEASURES

The FEHC regulations make it clear that an employer must take appropriate remedial steps when there is proof of misconduct – the behavior does not need to rise to the level of a policy violation or the law to warrant a remedy. Remember, an employer’s legal obligation is to take reasonable steps to prevent and correct unlawful behavior. In order to meet this obligation, an employer should:

- Stop behavior before it rises to the level of unlawful conduct, which is why steps should be taken even when the behavior is not yet serious enough to violate the law;
- Impose remedial action commensurate with the level of misconduct and that discourages or eliminates recurrence; and
- Look at what the company has done in the past in similar situations, to avoid claims of unfair (possibly discriminatory) remedial measures.

Remedial measures can include training, verbal counseling, one-on-one counseling/executive training, “last chance” agreements, demotions, salary reductions, rescinding of a bonus, terminations, or anything else that will put a stop to wrongful behavior.
Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person’s sexual orientation or gender identity.

**THERE ARE TWO TYPES OF SEXUAL HARASSMENT**

1. *“Quid pro quo”* (Latin for “this for that”) sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.

2. *“Hostile work environment”* sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interferes with your work performance or creates an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. A single act of harassment may be sufficiently severe to be unlawful.

**SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS**

**BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:**

1. Unwanted sexual advances
2. Offering employment benefits in exchange for sexual favors
3. Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
4. Derogatory comments, epithets, slurs, or jokes
5. Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
6. Physical touching or assault, as well as impeding or blocking movements

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within three years of the last act of harassment or retaliation.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney’s fees and costs if it prevails in litigation.

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

**EMPLOYER RESPONSIBILITY & LIABILITY**

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.
SEXUAL HARASSMENT
FACT SHEET

CIVIL REMEDIES

• Damages for emotional distress from each employer or person in violation of the law
• Hiring or reinstatement
• Back pay or promotion
• Changes in the policies or practices of the employer

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

1. Distribute copies of this brochure or an alternative writing that complies with Government Code 12950. This pamphlet may be duplicated in any quantity.

2. Post a copy of the Department’s employment poster entitled “California Law Prohibits Workplace Discrimination and Harassment.”

3. Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. The policy must:
   • Be in writing.
   • List all protected groups under the FEHA.
   • Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in prohibited harassment.
   • Create a complaint process that ensures confidentiality to the extent possible; a timely response; an impartial and timely investigation by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.
   • Provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor. That complaint mechanism must include, but is not limited to including: provisions for direct communication, either orally or in writing, with a designated company representative; and/or a complaint hotline; and/or access to an ombudsperson; and/or identification of DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
   • Instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so that the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).
   • Indicate that when the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
   • Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.

4. Distribute its harassment, discrimination, and retaliation prevention policy by doing one or more of the following:
   • Printing the policy and providing a copy to employees with an acknowledgement form for employees to sign and return.
   • Sending the policy via email with an acknowledgement return form.
   • Posting the current version of the policy on a company intranet with a tracking system to ensure all employees have read and acknowledged receipt of the policy.
   • Discussing policies upon hire and/or during a new hire orientation session.
   • Using any other method that ensures employees received and understand the policy.

5. If the employer’s workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.

6. In addition, employers who do business in California and employ 5 or more part-time or full-time employees must provide at least one hour of training regarding the prevention of sexual harassment, including harassment based on gender identity, gender expression, and sexual orientation, to each non-supervisory employee; and two hours of such training to each supervisory employee. Training must be provided within six months of assumption of employment. Employees must be trained during calendar year 2020, and, after January 1, 2021, training must be provided again every two years. Please see Gov. Code 12950.1 and 2 CCR 11024 for further information.

TO FILE A COMPLAINT
Department of Fair Employment and Housing
dfeh.ca.gov
Toll Free: 800.884.1684
TTY: 800.700.2320