

# #MeToo – Don't Let it Be You How to Prevent Sexual Harassment in the Workplace

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Harvey Weinstein started it and then the floodgates opened. Every day – every hour – new accusers come forward to report harassment by executives, celebrities and politicians. It spawned a movement and the media

can't get enough of it. Employers are naïve to think that their employees aren't listening. So what is an employer to do? Hold its breath and hope that the wave washes over soon? Or get in front of the problem and take affirmative steps to prevent harassment from occurring? Here are five simple steps employers can take now.

**1. Start by reviewing your policies.** California recently issued regulations detailing what must be included in a harassment policy (a link to the notice is included in the resources list below).

The policy must:

- List all protected groups under the Fair Employment and Housing Act (FEHA);
- Allow employees to report harassment to someone other than a direct supervisor;
- Instruct supervisors to report all complaints;
- State that all complaints will be followed by a fair, complete and timely investigation;
- State that the employer will maintain confidentiality to the extent possible;
- State that remedial action will be taken if any misconduct is found;
- State that employees will not be retaliated against for complaining or participating in an investigation; and
- State that supervisors, co-workers and third-parties are prohibited from engaging in unlawful behavior under the FEHA.

**2. Train your employees.** California employers with 50 or more employees are required by law to conduct mandatory harassment training every two years, and the training must contain a number of specific elements. California employers with just five or more employees must take all reasonable steps to prevent harassment from occurring. Training employees on what constitutes unlawful harassment and what to do if they experience or witness harassment is more than a “reasonable” step – it's critical.

**3. Review the EEOC's Proposed Enforcement Guidance for Unlawful Harassment** (see resources list below for a link to the guidelines). It includes a list of four “Promising Practices” for employers and serves as the EEOC's roadmap for preventing harassment. The four “Promising

Practices” are: (1) leadership and accountability; (2) comprehensive and effective harassment policies; (3) an effective and accessible harassment complaint system; and (4) effective harassment training.

**4. Investigate.** Employers in California are required to conduct a prompt and thorough investigation in response to any complaint of harassment. This applies not only to formal complaints filed in court or with a state or federal agency, but also to informal complaints. The standard in California for harassment by a supervisor is strict liability – the company is liable whenever the harassment is conducted by a supervisor. When the harassment is by a co-worker to another co-worker the company is liable only when it knew or should have known that the harassment was occurring and failed to take appropriate

action to remedy it. Turning a blind eye on harassment will always backfire. Instead employers should deal with the issue head on and investigate whenever there is even a hint of harassment. Employers can do the investigation themselves or hire a third party to conduct the investigation. The benefit of hiring an attorney to conduct the investigation is that the

investigation will then be cloaked under the attorney-client privilege.

**5. Take appropriate action where harassment is found.** If there is anything we can learn from the Weinstein stories and many of the #MeToo stories that followed, it is that the problem of harassment doesn't go away after time. It may simmer for a while but it will reach a boiling point. Therefore, action should be taken when harassment is found. But a one-size fits all approach isn't the answer. As the recent news stories show – harassment can occur in varying degrees of severity – ranging from a crude remark to actual assault. The appropriate level of discipline should also vary. It can range from a verbal counseling and additional training to termination.

Follow these steps to prevent harassment in your workplace and to prevent becoming the next employer on the long list of “#MeToos.”

## Resources

- California's harassment policy regulations: [https://govt.westlaw.com/calregs/Document/I97E9342CCF884FEB-B68AE8EF2A888600?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I97E9342CCF884FEB-B68AE8EF2A888600?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))
- EEOC's Proposed Enforcement Guidance for Unlawful Harassment: [www.regulations.gov/document?D=EEOC-2016-0009-0001](http://www.regulations.gov/document?D=EEOC-2016-0009-0001)
- For more information about Labor & Employment, please [www.swlaw.com/services/labor-and-employment](http://www.swlaw.com/services/labor-and-employment).

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