CIVIL RIGHTS DEPARTMENT

HARASSMENT PREVENTION GUIDE

For California Employers

CONTENTS

A California law called the Fair Employment and Housing Act (or FEHA for short) prohibits unlawful discrimination, harassment, and retaliation by employers against employees, job applicants, interns, and others. FEHA requires that employers "take reasonable steps" to prevent and correct discriminatory or harassing behavior, and regulations further clarify employers' obligation to prevent and correct wrongful behavior. (Gov. Code § 12940(j)-(k); Code of Regs., tit. 2, §§ 11023, 11024.)

The California Civil Rights Department (CRD) is the state agency that enforces FEHA by investigating, conciliating, and prosecuting complaints alleging discrimination, harassment, or another violation of FEHA, as well as by training employers and employees. CRD produced this guide to assist California employers in understanding their obligations to prevent and correct unlawful harassment. This guidance is for informational purposes only, does not establish substantive policy or rights, and does not constitute legal advice.

MUST EMPLOYERS HAVE AN ANTI-HARASSMENT POLICY?

Yes. California law requires employers to develop a written policy for the prevention of harassment, discrimination, and retaliation, and employers must distribute the policy to employees. (Code of Regs., tit. 2, § 11023.) Among other required elements, an employer's written policy must establish:

- Procedures for responding to and investigating complaints
- Prompt, thorough, and fair investigations of complaints
- Prompt and fair remedial action

A sample policy is available at: https://calcivilrights.ca.gov/employment/employerresources/.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

In addition to having a policy that meets or exceeds the requirements of Code of Regs., tit. 2, § 11023, an employer's anti-harassment program should 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);
- Buy-in from the top, meaning management understands and prioritizes the policy and models appropriate workplace behavior;
- Specialized training for complaint handlers; and
- Sexual harassment prevention training for supervisors and employees. By law, supervisors are required to complete two hours of training every two years, and non-supervisory employees are required to complete one hour of training every two years.

For more information, visit:
https://calcivilrights.ca.gov/employment/employerresources/.

ARE THERE SPECIAL CONSIDERATIONS FOR REMOTE OR VIRTUAL WORK?

Today, many employees work remotely for some or all of their workdays, many workplaces or workspaces exist virtually, and much interaction among employees, customers, vendors, and others occurs by email, chat, text message, or another electronic/virtual means. Remote and virtual work can have many benefits for employers and employees, such as less time spent commuting and easier communication.

Employers need to be attuned to the circumstances of remote and virtual work when preventing and correcting discrimination and harassment. For example, when working from home, some people may be less formal in their interactions with coworkers, and some workers may find it harder to discern a colleague's tone or intention over email or chat, leading to tension and misunderstandings.

Establishing clear policies and guidelines around appropriate behavior in the workplace is as important as ever, and these policies and guidelines should address remote and virtual work, as appropriate. Employers should ensure employees are clear on what is and is not permitted and understand how to report any behavior that crosses a line.

IF AN EMPLOYER RECEIVES A REPORT OF HARASSMENT OR OTHER WRONGFUL BEHAVIOR, WHAT SHOULD THE EMPLOYER DO?

Employers should prioritize reports of unlawful or inappropriate behavior. The first step is to determine whether the reported behavior is serious enough to merit a formal investigation.

If the reported behavior is not so serious, then the employer might be able to resolve the issue by counseling the individuals involved. For example, if an employee reports that they were discomforted by a co-worker's offhand compliment about their appearance, and there are no circumstances to suggest a more serious issue, it may be sufficient for the employer to counsel the person who made the remark against commenting on co-workers' appearances, even if complimentary and well-intentioned, and to let the reporting employee know the co-worker was counseled and the employer will take further action if needed.

However, if the report contains allegations of conduct that, if true, would violate the company's policies or the law, the employer must investigate the matter to make a factual determination about what happened. Once the investigation is complete, the employer should act based on the investigator's factual findings. The following sections address best practices around conducting fair and timely workplace investigations.

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

A common phrase 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 employers should:

- Conduct a thorough interview with the complaining party. Whenever possible, the investigation should start with this step. in a virtual setting, it can be a good idea to use video software, with all participants appearing on camera. It is not necessary to record the interview – in fact, recording can make people more nervous – unless it is required pursuant to an individual employer’s policy or union agreement.
- Give the accused party a chance to tell their side of the story. As mentioned above, this can be done in person or virtually. The accused party is entitled to know the allegations being made against them. But it is good investigatory practice 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 requires making the allegations clear and asking for a response.
- Interview relevant witnesses and review relevant documents. This does not mean an investigator must interview every witness or review every document suggested by the complainant or accused party. Rather, they should interview those witnesses and review those documents they determine could reasonably confirm or undermine the allegations or response.
- Do other work that might be necessary to get all the facts, such as visiting the work site if the alleged conduct occurred there, viewing videotapes, taking pictures, and reviewing

emails, chats, and text messages. If the alleged conduct took place virtually, visiting the office may not be useful or necessary. Instead, it may be useful to gather and review digital documents, such as emails, chats, screenshots, and calendar invites.

- Reach a reasonable and fair conclusion about what happened based on the information collected, reviewed, and analyzed during the investigation.

DO EMPLOYERS, INVESTIGATORS, OR EMPLOYEES HAVE TO KEEP ALL INFORMATION FROM AN INVESTIGATION CONFIDENTIAL?

There are several important perspectives to consider when it comes to confidentiality: that of the investigator, that of the employer, and that of the employees. Relevant questions include:

- To what extent must investigators (whether internal or external) keep the complaint or their investigation confidential?
- Can an employer require employees with insider knowledge of the complaint to maintain confidentiality?
- Should an employer keep a complaint confidential if the complainant does not want to pursue a formal investigation?

Different parties have different obligations, each of which are addressed in the following sections.

Can the investigator keep the complaint or information obtained during the investigation confidential?

The short answer is no. During an investigation, employers and their agents (including investigators) can only promise *limited* confidentiality – that the information will be shared only with those who "need to know," such as witnesses, company leadership, and human resources. An investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation to complete the investigation and take appropriate action. It is not possible to promise that a complaint be kept entirely confidential for several reasons:

- If the complaint is a potential violation of law or policy, the employer will need to investigate, and in the process of investigating it is likely that employees 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 – because allegations are often clear enough for people to figure out who complained about what.
- The individual receiving the complaint will usually have to consult with someone else at the company, such as management or human resources, about what steps to take, whether there have been past complaints involving the same employee, and so on. That

means the complaint will be discussed with others within the organization.

- 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 from the accused party, due process requires the employer to inform the accused party of the nature of the complaint before disciplining them or taking remedial action.

Can employers tell employees not to talk about the investigation?

CRD and its federal counterpart, the U.S. Equal Employment Opportunity Commission, consider adequate confidentiality protections to be a best practice because they can help maintain the integrity of the investigation and protect employees' privacy. However, this is a complicated issue because guidance from the National Labor Relations Board (NLRB) on whether and to what extent employers can require confidentiality during an open investigation is evolving. See *Stericycle, Inc. & Teamsters Loc. 628* (2023) 372 NLRB No. 113, overruling *Apogee Retail LLC d/b/a Unique Thrift Store* (2019) 368 NLRB No. 144. Employers should consult an attorney to determine whether and when it is appropriate to require employee confidentiality and how to do so lawfully.

What should an employer do if the complainant asks them not to do anything?

It is rarely appropriate for an employer or investigator to fail to investigate a complaint simply because an employee asks not to elevate their complaint or says they will address the problem themselves. If the complaint involves minor allegations and the complainant wants to handle the situation on their own, the employer can coach the complainant on how to do so. However, the employer should follow up and ensure this has occurred and the harassment has stopped. If the allegations are more serious, the employer will need to take appropriate action. In those cases, it is not appropriate for the complainant to handle the matter alone.

HOW QUICKLY DOES AN INVESTIGATOR NEED TO BEGIN AND FINISH AN INVESTIGATION?

Investigators should start the investigation promptly and as soon as is feasible. Once begun, the investigation should proceed and conclude quickly, while also ensuring it is thorough and fair to all parties. A prompt investigation helps stop harassing behavior, sends a message that the employer takes complaints seriously, helps ensure the preservation of evidence (both physical evidence, such as emails and videos, and witnesses' memories), and allows the employer to fairly address the issues in a way that minimizes disruption to the workplace.

Some companies set up specific timelines for responding to complaints depending on how serious the allegations are. For example, if the complaint involves claims of physical harassment or a threat of violence, the employer's policy might require the employer to act the same day as the complaint is received. If the allegation is less urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation within a few weeks (although that depends on several factors, including the availability of witnesses).

WHAT ARE SOME RECOMMENDED PRACTICES FOR CONDUCTING WORKPLACE INVESTIGATIONS?

Impartiality

The investigation should be impartial. Factual findings should be based on objective weighing of the evidence collected. It is important for the employer and investigator to assess whether the person conducting the investigation has any biases that would interfere with them reaching fair and impartial factual findings and conclusions. If they cannot be neutral, the employer must find someone else to conduct the investigation.

Even if the investigator determines 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, if the investigator has a personal friendship with the complainant or accused party – either actual or

perceived – the investigator may need to recuse themself to avoid the appearance of bias. It is generally a bad idea to have the investigator be in a position of less authority than the complainant or the accused party.

Investigator qualifications and training

QUALIFICATIONS

For workplace investigations, employers may use an employee as an investigator or hire an external investigator. In instances of discrimination or 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 Bus. and Prof. Code § 7520 et seq.)

Whether internal or external, the investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to discrimination and harassment, as well as investigative techniques related to questioning witnesses, documenting interviews, and analyzing information. They should have sufficient communication skills to conduct the interviews and deliver the findings in written or verbal form. For more complex and/or serious allegations, it is also important for the investigator to have prior experience conducting such investigations.

TRAINING

There is no one standard training program for workplace investigators. Internal investigators are usually trained by HR professional organizations, such as the Society for Human Resource Management (SHRM), Northern California Human Resource Association (NCHRA), and Professionals in Human Resource Association (PIHRA). They may also be trained by professional organizations for workplace investigators, such as the Association of Workplace Investigators (AWI) or by enforcement agencies such as CRD or the U.S. Equal Employment Opportunity Commission. Many law offices and vendors that provide harassment prevention training also provide training for investigators. At a minimum, an investigator must be trained about relevant laws, how to determine what to investigate, effective witness interviews, weighing credibility, analyzing information, and writing a report. An introductory training program typically lasts a full day or 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 getting information while not causing people to feel attacked. Investigators should ask open-ended questions about all areas relevant to the complaint to get complete information from the parties and witnesses.

Making credibility determinations

If there is no substantial disagreement about the factual allegations, it may not be necessary for the investigator to determine credibility. However, many investigations require investigators to assess, determine, and weigh the parties' credibility. In most cases, if the investigator gathers and analyzes all relevant information, it is possible to come to a sensible conclusion.

CONFLICTING ACCOUNTS

Often the complainant and the accused party will have conflicting accounts of the same event. It is not uncommon for there to be no direct witnesses to discrimination or harassment (aside from the parties directly involved), in which case the investigator must make determinations about the parties' credibility. In such cases, there may be other evidence that would tend to support or detract from their accounts. This kind of evidence might include documents, emails, texts, or comments made to others following an event of harassment. For example, someone may have seen the complainant looking upset shortly after the event or the complainant may have told someone about it. This would tend to bolster their credibility. On the other hand, it would tend to bolster the accused party's credibility if, for example, the investigator learned that the complainant brought their complaint many months after exchanging sexual jokes with a supervisor, told a coworker they could use the joking against the supervisor in the future, and was recently given a negative performance review.

Even if there is no evidence other than the parties' respective statements, the investigator should weigh the credibility of those statements and make a finding as to who is more credible. The investigator can use the credibility factors listed below.

CREDIBILITY FACTORS

Credibility factors include the following:

- Inherent plausibility – Are the facts put forward by the party reasonable? Does their story hold together? Is it plausible that events occurred in the manner alleged?

- Motive to lie – Does a bias, some interest, or other motive exist for lying? Does someone have a reason to be untruthful?
- Corroboration – Is there a direct or indirect witness who corroborates some or all of the allegations or response? Is there other information that corroborates one party's side?
- Extent a witness was able to perceive, recollect, or communicate about the matter – Could the witness have reasonably perceived the information reported? This includes an assessment of factors such as where the witness was at the time or whether there were distractions present that may have affected the witness's ability to perceive the event. In a virtual setting, this may be more straightforward: Was the person on the meeting or email thread in question?
- History of honesty/dishonesty – Although investigations are not meant to make character judgments about the parties (whether they are a "good person"), if someone is known to have been dishonest, this can weigh against their credibility.
- Habit/consistency – Do the allegations reflect behavior that someone is known to do on a regular basis (such as hugging all female employees or all employees in greeting)?
- Inconsistent statements – Has an individual provided multiple statements about the event with inconsistencies that are not easily explained?
- Demeanor – Experts caution against using demeanor evidence, as most people cannot effectively evaluate truthfulness from someone'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, the investigator's conclusions should be based on an analysis of the objective evidence.

Burden of proof

Investigators should make findings based on the "preponderance of the evidence" standard. This is the standard that civil courts use in discrimination and harassment cases. This standard is also referred to as the "more likely than not" standard. That is, the investigator makes a finding of whether it is more likely than not that the alleged conduct did or did not occur. Some people describe a preponderance of the evidence standard as "fifty percent plus a feather."

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. The "beyond a reasonable doubt" standard 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 this standard or the "clear and convincing evidence" standard in a workplace investigation creates an unrealistic expectation about the level of proof needed to make a decision.

Investigators should reach factual conclusions, not legal conclusions. This means even if the allegation includes concerns about potentially unlawful behavior, an investigator should only

reach findings about the facts (that is, what happened) and should not reach a conclusion about whether the conduct was unlawful.

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' allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports the conclusion that Mr. Foster did tell sexually explicit jokes at meetings.*

Sometimes, internal investigators must also decide whether behavior did or did not violate a company policy. Such conclusions are different than legal conclusions because violating a workplace policy is not always the same as violating the law. 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 that 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, for example:

> *Mr. Jones' 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 based on information directly obtained from witnesses for witnesses to sign, obtaining witness statements (written by the witness), or making audio recordings or video recordings if the interview takes place virtually. Each method has pros and cons, 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 how the investigator documents their interviews (unless there is a good reason to change their 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.

ANONYMOUS COMPLAINTS AND RETALIATION

Investigating anonymous complaints

Employers should investigate anonymous complaints in the same manner as those with an identifiable complainant. 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.

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.

The fact that the complaint is anonymous is not a reason to ignore it.

Retaliation

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Retaliation can take many forms. In addition to actions such as terminations or demotions, retaliation can include actions like giving negative performance reviews, increasing a

person's workload, reassigning projects, or ostracizing the employee.

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 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

An employer's legal obligation is to take reasonable steps to prevent *and* correct unlawful behavior. To meet this obligation, an employer should:

- Address misconduct, even if it does not rise to the level of a policy or legal violation. Stopping unwanted behavior even when it is not yet serious enough to violate the law prevents it from progressing further.
- Impose remedial action that is proportionate to the level of misconduct and that discourages or eliminates recurrence.
- To avoid claims of unfair or discriminatory remedial measures, review what the company has done in the past in similar situations.

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.

FILING A COMPLAINT WITH CRD

In addition to participating in an employer's internal complaint process, employees who believe they have experienced harassment, discrimination, or retaliation can file a complaint with CRD. CRD may investigate, offer conciliation services to try to settle the dispute, and prosecute the case in court if the dispute cannot be settled. A complaint must be filed with CRD within three years of the date of the alleged unlawful act or acts.

For more information, visit CRD's complaint process webpage www.calcivilrights.ca.gov/complaintprocess, a CRD office, or call one of the following numbers:

Toll Free: 800.884.1684

TTY: 800.700.2320

CRD can reasonably accommodate people with disabilities who participate in our complaint process. For more information, contact CRD through any method above or through the California Relay Service (711) for individuals who are deaf or hard of hearing or have speech disabilities.