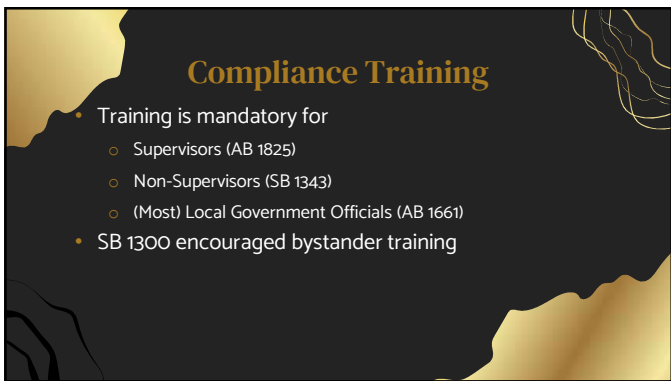




1



2



3

Compliance Training

- Primary focus is on legal defense and transferring knowledge about policies and procedures
- Effective in raising awareness of problematic behaviors and processes for raising concerns
- Generally, not effective in changing attitudes or behaviors

4

Go Beyond the Minimums

- Organizations need to expand training
 - Implicit bias
 - Diversity, equity, inclusion, and belonging
 - Civility
 - Bystander training
 - Supervisory best practices
 - Soft skills
- Focus on culture change and developing empathy

5

Improving Training

- Develop customized in-person training that is only supplemented by online training
 - In-person training is more effective
 - Important to customize training for the public sector
- Consider developing an internal supervisor training series
- Consider smaller group roundtable training
- Match up by profession, level in the organization, etc.

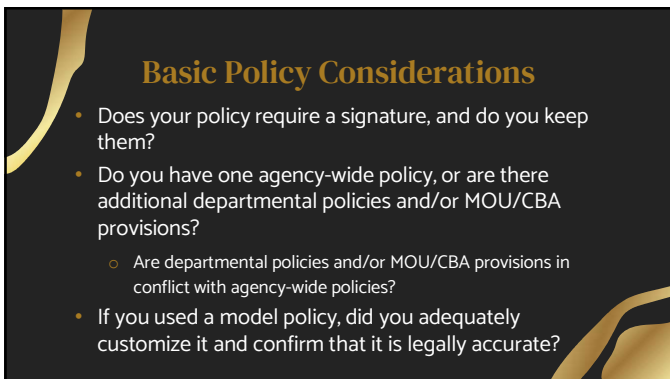
6



7



8



9

Policy Drafting

Instead of This...

- Requirement for an employee to confront their alleged harasser before reporting
- Requirement that an employee report harassment only to their supervisor

Try This...

- Designate who can receive complaints – HR and any supervisor
- Suggested reporting procedures when an employee wishes to complain about
 - Elected or appointed officials
 - Head of Agency
 - Human Resources employees
 - Agency legal counsel

10

Policy Drafting

Instead of This...

- Detailed provisions about how an investigation will be conducted
- Strict time limits for completing an investigation Provisions that tie complaining about harassment to a separate grievance or complaint policy
- Provisions that permit an investigation to be grieved

Try This...

- Commitment to conduct a timely, good faith, impartial investigation
- But without tying yourself to a particular timeframe or process

11

Policy Drafting

Instead of This...

- Statements that promise complete confidentiality

Try This...

- Commitment to protect confidentiality to the extent practical
- Be clear that some disclosure will happen and that complete confidentiality cannot be promised

12

Policy Drafting

Instead of This...

- Policies that only refer to sexual harassment, while remaining silent on other protected characteristics

Try This...

- All categories currently protected by the FEHA and federal law

13

Policy Drafting

Instead of This...

- Provisions that authorize supervisors to investigate

Try This...

- Statement on who is authorized to investigate
- Clear statement of a manager/supervisor’s duty to timely report potential harassment in the workplace and to whom they should report

14

Policy Drafting

Instead of This...

- Provisions on the level and type of discipline that will be taken
- Provisions that only prohibit “unlawful” harassment, discrimination, or retaliation

Try This...

- Commitment to appropriate corrective action if policies are violated
- Reserve the right to take disciplinary action for inappropriate conduct that doesn’t rise to the legal standards

15

Policy Drafting

Instead of This...

- Provisions that prohibit anonymous complaints

Try This...

- If you maintain an anonymous reporting system, highlight it
- Be clear that while the Agency will do its best to investigate and address anonymous complaints, the anonymity may compromise the Agency's ability to complete a thorough investigation

16

Make Sure to Also Include...

- Prohibition of harassment by co-workers, managers, supervisors, and third parties
- Reserve the right to place an employee on administrative leave during an investigation
- Clear prohibition on retaliation, including an explanation of what retaliation is, how to report it, and a commitment to investigate complaints of it

17

8 Ignoring "Informal" Complaints

When you know, you know. When you should have known, you know

18

Common Complaint Challenges

Failing to act because...

-  ...no one complained
-  ...it wasn't a formal complaint
-  ...the employee wouldn't put it in writing
-  ...it happened after work

19

Employer's Affirmative Duty

- "Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct." Gov. Code § 12940(k); 2 CCR § 11023(a)
- Employer = Supervisor
- There are no "magic words" required to make a complaint

20

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...

2017 DFEH Harassment Guide

21

Educate Your Supervisors

- Training for supervisors should include practical guidance on when their obligation to report to HR has been triggered
 - Factual scenarios about the different ways in which the supervisor can become aware of potential harassment
 - Guidance on how to handle the conversation
 - Clear guidance on the expansiveness of this obligation
 - Extends to employees outside their chain of command
 - Extends to "off duty" conduct

22

Not Understanding Intersectionality
Because people aren't just one thing

7

23

What is Intersectionality?

- The term "intersectionality" has been used in many disciplines and contexts
- In terms of harassment and discrimination, intersectionality means that there are multiple grounds for discrimination or harassment that operate simultaneously and interact in an inseparable manner
- In litigation, it has historically been referred to as a "sex plus" claim

24



25

Intersectionality in Litigation

- In **Bostock v. Clayton County**, three different employers terminated employees upon learning that the employee was gay or transgender
- In ruling that Title VII prohibits employers from firing an employee for being gay or transgender as a form of sex discrimination, the U.S. Supreme Court made clear that Title VII's "but for" standard of causation allows for more than one factor to be relevant to the analysis

26

"When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."

Bostock v. Clayton County
(2020) 140 S.Ct. 1731, 1742

27

Other Intersectionality Cases

<p>Phillips v. Martin Marietta Corp. (1971)</p> <p>Company violated Title VII by refusing to hire women with young children when it would hire men with young children – even though company showed that, overall, it hired more women than men</p>	<p>LADWP v. Manhart (1978)</p> <p>LADWP violated Title VII by requiring women to make larger pension contributions than men because women tend to live longer than men</p>
<p>Jefferies v. Harris County Cmty. Action Ass'n. (1980) and Lam v. University of Hawaii (1994)</p> <p>Recognizes the applicability of sex plus claims to include sex plus race claims</p>	<p>Frappied v. Affinity Gaming Black Hawk (2020)</p> <p>Recognizes the applicability of sex plus claims to include sex plus age claims</p>

28

Addressing Intersectionality

- Be mindful when concerns or complaints are raised
- Make sure HR Professionals are educated in intersectionality to understand the nature of an employee's concern
- Make sure investigators are properly identifying the employee's alleged basis for harassment or discrimination
- Incorporate the topic during DEIB initiatives and efforts made to help employees feel included in the workplace and educate employees

29

6

Focusing on the Alleged Harasser's Intent

It still hurts even if you didn't mean it

30

But They Didn't Mean to Offend...

 "He's just a big flirt. Everyone knows that."

 "He was just giving you a compliment."

 "She's just joking. You shouldn't take her seriously."

 "They just don't have a good filter. Just tune them out like everyone else does."

 "She's from a different generation. She's just not used to all this multicultural, diversity stuff."

31

Intent vs. Impact

Intent	Impact
<ul style="list-style-type: none"> • What you wanted to do • What you think you did • How you feel or think 	<ul style="list-style-type: none"> • The reality of your actions • What they think you did • How you made another think or feel

32

"We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment. That is because Title VII is not a fault-based tort scheme. Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers."

Ellison v. Brady
(9th Cir. 1991) 924 F.2d 872, 880

33

Addressing Intent vs. Impact

- When addressing harassment, harm is still experienced by your agency and by your employees, regardless of what was intended
- Employers should address the harm caused by harassment in their workplaces
- Specifically address this in employee training as it relates to harassment prevention and DEIB initiatives
- Consider training employees in effective communication strategies and other soft skills

34

Failing to Address Abusive Conduct

Stop ignoring the mean elephant in the room

5

35

The Challenge

- We know abusive conduct is a problem
 - On its own
 - As a precursor to workplace harassment and/or workplace violence
- AB 2053 requires it be discussed in harassment prevention training
 - That is insufficient to address the issue of abusive conduct

36

The Harm

- Creates a toxic work environment
 - Limits a group's ability to effectively work together
 - Reduction in help and support of coworkers
- Challenges in recruiting and retaining good employees
- Will eventually lead to harassment complaints and/or workplace violence complaints

37

Addressing Abusive Behavior

- Adopt a policy that is appropriate for your Agency
- Set expectations from the top down on how to treat each other
- Establish a complaint procedure for employees to raise concerns about abusive conduct
- Consider an anonymous reporting system
- Include education about abusive conduct during the onboarding process

38

Addressing Abusive Behavior

- Investigate complaints of abusive conduct and take appropriate corrective action
- HR should conduct "stay interviews" and regularly check in with employees
- Provide EAP services and normalize discussions around mental well-being
- Educate all employees (and possibly officials) – separate from harassment compliance training:
 - Abusive conduct
 - Workplace violence
 - Conflict management
 - Communication skills
 - Bystander intervention
 - Handling combative members of the public

39

4

Using Unqualified or Inexperienced Investigators

It matters who is asking the questions

40

“The investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to harassment, investigative techniques 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.”

2017 DFEH Harassment Guide

41

Use of Internal Investigators

- Internal investigators...
 - should be vetted for possible conflicts and for the appearance of bias
 - need to be independent and free from influence
 - should generally not have a role in future disciplinary action
 - need to receive adequate training
 - need to have sufficient time and resources to conduct an investigation

42

Use of External Investigators

- External investigators...
 - should be vetted for possible conflicts and for the appearance of bias
 - need to be independent and free from influence
 - do not have to be an attorney (but it is advisable in many situations)
 - Must be an attorney or a licensed private investigator
 - need to have the right skills and background
 - need to be able to timely complete the investigation

43

The Cost of External Investigators

- An external investigator can be expensive, but the most affordable option isn't always the best investment
- Consider including potential investigation costs in your annual legal budget
- Consider adopting a panel of qualified investigative firms to avoid having to seek contract approval from your governing body for each investigation
 - There may be circumstances where you must use a non-panel firm or investigator
 - Have enough investigators to avoid issues with repeatedly using the same investigator or firm

44

Selecting an External Investigator

- Does this investigator have the right experience?
 - Public sector – specific to your type of agency, if relevant
 - Relevant non-investigator experience?
- What kind of attorney investigator do you need?
 - One who has only ever been an investigator?
 - One who previously practiced in other areas?
 - One who has a practice not just limited to investigations?
- What kind of non-attorney investigator do you need?
 - Licensed private investigator
 - Training

45

Selecting an External Investigator

- What litigation experience does the investigator have?
- Did you check references?
- Have you seen a sample report?
- Did your labor and employment attorney review the retainer?

46

Failing to Take Appropriate Corrective Action

3

The punishment really does need to fit the crime

47

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.

2017 DFEH Harassment Guide

48

Potential Corrective Action

- Training and education
- Counseling
- Disciplinary action
 - Reprimands, suspensions, demotions, reductions in pay, termination
- Change in duties, work location, work hours, etc.

49

Goals of Corrective Action

- Protect the victim of harassment
- Remedy any harm caused by harassment
- Enforce the agency's policy against harassment
- Select corrective action(s) that you are reasonably confident will deter future harassment

50

Common Challenges

- Failing to identify the root cause of the issue
- Failing to target corrective action to combat the root cause of the issue
- Strict adherence to "progressive discipline" when not clearly mandated by statute/rules/policy/MOU/CBA
- Ignoring or minimizing employee misconduct in favor of the employee's positive contributions to the workplace

51

What if the Corrective Action Fails?

- Then try again
- Make sure employees understand that they should bring any concerns forward after the conclusion of the investigation
 - Continued harassment or discrimination
 - Potential retaliation

52

2 Failing to Bring Closure to Involved Parties

You have to have an ending

53

Who Needs Closure?

- Anyone who was involved in the investigation:
 - The complainant
 - The accused
 - The witnesses
- What kind of closure do they need?
 - Generally, written notification of the conclusion of the investigation
 - Comply with internal policies and MOU/CBA requirements

54

Closure for the Complainant

- The investigation has concluded; thank you for your cooperation
- The agency has found that...(for example)
 - Your allegations were sustained, not sustained, sustained in part, etc.
 - While no harassment occurred, improper conduct did occur which violates agency policy
- The agency will be taking appropriate corrective action
- Admonitions about retaliation
- Identify to whom they should address future concerns

55

Closure for Witnesses

- The investigation has concluded; thank you for your cooperation
- Admonitions about retaliation

56

Closure for the Accused

- The investigation has concluded; thank you for your cooperation
- Based on the greater weight of the credible evidence, the investigator found as follows (for example)...
 - The allegations were sustained, not sustained, sustained in part, etc.
 - General summary of violations and reference to disciplinary action (separate document and process) or non-disciplinary corrective action and directives
- Admonitions about retaliation

57

1

Failing to Hold Supervisors Accountable

Let's put "super" back in supervisor

58

Reminder: Who is a Supervisor?

- Under the FEHA, a person is a supervisor if they had the authority
 - To hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees;
 - To direct other employees;
 - To adjust employees' grievances; OR
 - To effectively recommend such actions if it is not merely of a routine or clerical nature but requires the use of independent judgment

59

What Should Supervisors Be Doing?

- Leading by example
- Raising concerns and potential issues to HR immediately
- Addressing performance and misconduct issues immediately
- Mindfully creating effective documentation

60

How to Hold them Accountable

- Set clear expectations and communicate them to supervisors
- Provide them with necessary resources (education, clear policies, appropriate evaluation system, etc.)
- Address concerns immediately through counseling, evaluation, discipline

61

Discussion and Questions

Kelly Trainer Policky
 Employment Practices Manager
 California Joint Powers Insurance Authority
 562.467.8700 | www.cjpia.org

CREDITS: This presentation template was created by Slidesgo, including icons by FlatIcon and infographics and images by Freepik

62

Complete Session Surveys on the App

Find the App, Click on Events, Click on Browse by Day, Click on the Specific Session, Click on Rate Event.

63
