Guiding Principles for the California State Legislature-
Anti-Harassment Policy & Complaint Procedure

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Introduction

Sexual harassment understandably has become a primary focus for legislative bodies everywhere. This workplace environment is uniquely susceptible to sexual harassment situations because it is driven by complex power dynamics. The careers and futures of many individuals are held in the hands of a few very influential people, creating a climate where abuse of power can go unchecked.

Another risk factor in the legislative workplace is the wealth of young, aspiring, competitive employees enthralled by powerful, often older, people. Conditions are ripe for sexual harassment, but also for positive transformation of the culture. As a leader in workplace change, California must lead on creating legislative organizational environments that prevent all forms of harassment.

Such transformation of our workplaces will not come solely through compliance. Rules, education and training to prevent or address sexual harassment are important, but they cannot occur in a vacuum. Moreover, we have seen case after case of problematic behaviors and situations that never rise to the legal definition of harassment. In this gray area, real damage is being done to people's lives and careers.

That is why compliance and training alone is ineffective. Workplace standards must support a larger, holistic culture that will not tolerate any kind of harassing behavior. Culture—not HR

policy—represents the core values and beliefs of the organization. A healthy workplace culture ensures that when sexual harassment is observed or experienced, the community shuts it down collectively, with a message that such behavior will not be tolerated by anyone at any level.

Within this healthy culture, claims of harassment are investigated immediately, quickly and transparently, ideally by an independent panel. If a behavior is found to violate the culture of the organization, that individual should be subject to progressive disciplinary procedures up to and including termination.

However, in the zeal to root out sexual harassment, organizations must not swing too far in the other direction, creating a climate of "guilty until proven innocent." Many harassment allegations are found to be unsubstantiated and, in some cases, outright untrue, so a trustworthy due process should protect the accused until he or she is found either responsible or innocent of wrongdoing.

Sexual harassment in the legislative workplace wreaks havoc on elected officials' ability to do their jobs and serve the public effectively. Even if a situation never reaches the level of a complaint, but it pushes good people out, we have lost precious talent. With California's unemployment rate at 4.3 percent and falling, this is something no employer can afford.

As leaders and legislators, we must expect more. The message of creating healthy cultures that prevent harassment must come from the top and apply to everyone—including every elected official and every other leader.

SHRM's Recommendations

1. There should be a policy specific to sexual and other forms of unlawful harassment, such as race, disability and national origin. A general non-discrimination policy is insufficient.

    a. There can be one policy for all kinds of unlawful harassment or there can be separate but linked policies for sexual harassment and harassment based on other protected factors, such as race, disability and national origin.

    b. The Anti-Harassment Policy can be a stand-alone policy or part of a more comprehensive equal employment opportunity policy that also deals with non-discrimination, reasonable accommodations, etc.

    c. It is important to note that, in order there for there to be a culture in which harassing behavior does not flourish, legislative bodies must do more than have the policy on line or simply distribute it. Among other steps, there should be periodic reminders throughout the year of the values underlying and the prohibitions in the policy.

2. Although we are dealing with a legal issue, it is important that the policy not focus on legal labels to describe prohibited behaviors, such as "sexual harassment includes, but is not limited to,…." This is important for at least 3 reasons:

    a. The policy (and culture) should prohibit behaviors that are harassing, even if not severe or pervasive enough to be unlawful.

    b. Focusing on the legal definition may send the unintended message that the policy is designed simply to avoid legal liability as opposed to avoiding harm to individuals.

    c. If an employee or member violates the policy, he or she should receive appropriate corrective action, as discussed below. However, he or she should not automatically be labeled as someone who has violated the law. That will not always be the case.

3. Instead of using legal labels, the policy should provide specific examples of behaviors that are unacceptable, and therefore, prohibited, even if any one of them is not unlawful in and of itself.

    a. With some exceptions, such as sexual assault, an isolated act, such as one sexist "joke," will not, in and of itself, be "bad enough" to be unlawful. However, the legislative body must send a strong message that harassing conduct will not be tolerated, even if the specific conduct at is not unlawful in and of itself. It still pollutes the culture, runs counter to inclusion and creates fertile soil for unlawful harassment.

    b. With regard to sexually harassing behaviors, legislative bodies need to define what is prohibited broadly. Obviously, conduct of a sexual or suggestive nature should be covered. But the legislative body also should make clear that the policy applies to conduct that demeans or denigrates a protected group, such as stereotypic comments about the worth of women, even if not sexual in nature.

    c. While legislative bodies must provide specific examples to provide notice what is prohibited, the legislative body must be sensitive to how the examples are articulated. The material covered by the policy is, by definition, offensive. For example, with regard to race, the legislative body might include the "N" word as an example but without spelling out what it means.

4. The policy must cover all applicants, employees, interns and members. These individuals are both protected under and restricted the by policy, protected from harassing behavior and restricted from engaging in it.

    a. The policy also must make clear that the policy's restrictions apply to non-employees, such as lobbyists, contractors and constituents with whom

employees and members may come into contact in the course of their employment.

b. Conversely, the policy also should make clear that applicants, employees and members cannot engage in harassing or otherwise offensive behavior relative to such non-employees.

5. The policy also should make clear its broad scope, in particular:

a. Obviously, the policy applies in the workplace. But the policy should be clear that its prohibitions also apply to business trips, social events, etc. The key is relationships, not locations.

b. The policy also should call out its application to social media, e-mail, text messages, and other forms of communication. As a side note, these other policies should reference the legislative body's anti-harassment policy so the culture provides multiple reminders of what is unacceptable and will not be tolerated.

6. There must be a complaint procedure by which, at a minimum, applicants, employees and members can raise concerns they have about conduct prohibited by the policy.

a. It is very important that the policy be clear that an individual can raise concerns not only if he or she has been exposed to harassing behavior but also if he or she is a "bystander," that is, if he or she has seen, heard or otherwise becomes aware of harassing conduct directed at someone else.

b. Related, the important role of "bystanders" must be addressed in the training of those with supervisory and/or institutional power. If an individual has power, he or she cannot be a passive bystander. To be silent is to condone. This bystander obligation, emphasized in training, is critical if the culture is to reflect the policy.

7. The California Legislature may wish to consider opening up the complaint procedure to individuals who are not employed by but who have a contract with or otherwise interact with its employees/members. For example, the legislative body may want to have a complaint procedure available to employees employed by contractors who do work for the legislative body and/or lobbyists.

a. Extending the scope of the complaint procedure beyond applicants, employees and members of the legislative body not only may help mitigate harm to such individuals who interface with the legislative body but also protect the legislative body from reputational risk.

b. It should be noted that extending the policy to non-employees also carries with it some risk, for example only, extending the complaint procedure to employees of a contractor may increases the joint employer risk, although

the policy can be drafted to mitigate (not eliminate) the joint employer risk even if the complaint procedure is accessible to third parties.

8. Ideally, individuals should be given multiple options in terms of whom they may contact. Individuals cannot be limited to telling their supervisor, for example, because he or she may be the person engaging in—or complicit in tolerating--the unacceptable conduct.

    a. In developing the potential points of contact for the complaint procedure, the legislative body may wish to consider 3 types of diversity to make the complaint procedure more user friendly/accessible:

        i. It is beneficial if the points of contact reflect diversity in terms of gender, race, ethnicity, etc. of the individuals who may wish to access the procedure.

        ii. It is also beneficial if there be "functional" diversity in terms of positions held—for example, not everyone should be an elected official.

        iii. Geographic diversity should be considered, too, in terms of who may be contacted.

    b. The legislative body also may wish to consider having an 800 hotline with no caller ID, or an online app, by which applicants, employees and members (and perhaps others) can raise concerns anonymously. Even with robust assurances against retaliation, many individuals fear retribution and suffer in silence rather than raise concerns.

        i. There are some risks of anonymous reporting—the legislative body may be put on "notice" of a potential problem but not be given enough information to determine who is the object of the complaint or even the target.

        ii. As with all complaints, anonymous reporting highlights the need for each legislative body to have well trained and experienced investigators who understand they must protect all and consider the concerns not only of the complainant but also the accused. While no reasonable person can deny the persistence and pervasiveness of harassment and the collective experience of women, that does not mean every complaint is necessarily true.

9. Confidentiality is a critical element to the policy. When it comes to confidentiality, there are two distinct issues.

    a. First, during the investigation, the legislative body should disclose information only as necessary to investigate and/or take corrective action. In particular, to paraphrase the EEOC: maintain as confidential as possible

the identity of the complaint, witness and target consistent with conducting a prompt, thorough and impartial investigation.

b. Second, after the investigation is complete, the question becomes whether and how the results of the investigation should be shared. SHRM believes should not be addressed in the policy but rather consider all relevant factors based on the incident independent of a policy.

10. Non-retaliation is a critical element of the policy (as well as training, follow-up to investigations, etc.). Individuals must feel safe to report.

    a. The policy should define broadly who is protected from retaliation consistent with the law. This includes, for example:

        i. Complainants

        ii. Witnesses

        iii. Others who have participated in the investigation

        iv. Other associated with the complainant, such as a spouse.

    b. The policy should also define broadly what may be retaliation consistent with the law. This includes, for example:

        i. Adverse tangible employment actions

        ii. Material changes to the terms and conditions of employment

        iii. Harassment (ostracism)

        iv. Bad mouthing the complainant outside of the workplace

    c. The policy should make clear that the fact that a complaint lacks legal merit does not result in the loss of protection against retaliation. So long as the individual acts in good faith, he or she generally is protected from retaliation by anyone of any kind

    d. In terms of corrective action, just as the California legislature should respond to harassing behavior, even if not bad enough to be unlawful, the legislative body should respond to retaliatory behavior, even if not material enough to be unlawful. We need to create a culture where the number one inhibitor for reporting—retaliation--is mitigated by when we take corrective action.

11. Corrective action

    a. The policy should make clear that corrective action will be taken if conduct is unlawful or unacceptable, even if not unlawful in and of itself.

b. Generally, level of corrective action should be proportionate to the wrong with factors such as the nature of the wrong and the position held being critical. At a very minimum, the corrective action must be reasonably calculated to prevent future harassing conduct from occurring.

c. The California Legislature should be careful not to send a zero-tolerance message, which may be heard as suggesting that any bad behavior, regardless of level, will result in termination. This may discourage an employee from reporting as a results of which he or she suffers in silence because she or he does not want someone else to lose his or her job.

d. The policy should not spell out what will be communicated to the public. That will depend on all relevant circumstances and should be dealt with independent of the policy.

e. The policy should not state that, if there is a settlement, the employee who was accused of wrongdoing must repay the amount owed. A payback provision may stimulate the person accused of wrong to want to fight until the end, which can have adverse consequences on the victim of the wrongful conduct. Such a rule also may discourage individuals from pursuing public service.

12. Intimate Relationship

a. As we all know, sexual harassment in particular is not just about sex. It involves power.

b. It is not practical to try to stop any intimate relationship from occurring by individuals who work in or with a legislative body. Prohibitions simply result in the relationships going underground, contrary to the transparency in culture desired.

c. However, where there is an intimate relationship, if there is a power differential, that is one of the parties has direct or indirect institutional or supervisory authority over the other, the potential for sexual harassment claims is very real.

d. For this reason, consideration should be given to requiring that, if there is an intimate relationship, the party with power must disclose it to a designated individual. Efforts then can be made to separate the professional from the personal. Such a reporting requirement not only mitigates the risk of sexual harassment occurring but also actual or perceived conflicts of interests. Indeed, many employers include such a requirement in their conflicts of interest policy.

13. Training

a. Management Buy-In. Attending and participating in sexual harassment training as elected officials, will send a strong message that the legislature takes this issue seriously. So, too, will ensuring that senior level employees FULLY participate in training. When senior staff evade training on harassment due to workload, scheduling conflicts or other stated reasons, employees not only dismiss the training as well, but may not take harassing conduct in the workplace seriously either. In order for training to be effective, it must be endorsed by the leaders. The policy should mandate that all levels of employees must attend.

b. Live Training vs. Online Training. Live training has exceeded online training in effectiveness overall; however, some companies have seen success in a "blended approach" that includes some live training and some online training. The online training can be used to send a uniform message across the entire organization and reach some employees that due to unique schedules, would not be able to take the live training during normal business hours. The live training component can then be used to build off the foundation set by the online training. Without the special needs of a large remote workforce, the legislature should strongly consider conducting live training to allow for more robust interaction between trainer and participants.

c. Overcoming Training Obstacles. Another issue many organizations run into about sexual harassment training is boredom, redundancy or a lackluster attitude from employees. One solution is to spread training over three or more short workshops that are held once per quarter instead of one long day of training.