

## RESOLUTION 04-07-2018 – AS AMENDED

### DIGEST

#### Workplace Harassment: Prohibit Workplace Harassment Unrelated to Protected Class

Adds Labor Code section 235 to make workplace harassment unlawful, without regard to the employee's or independent contractor's inclusion in a protected class.

### STATEMENT OF REASONS

The Problem: Existing law prohibits harassment by employers against employees where a substantial motivating reason for the harassment is the employee's status, i.e. being a member of a protected class (e.g., age, race, disability, sexual preference, etc.) (Govt. Code §12940(j)). Such workplace harassment may constitute an adverse action sufficient to warrant a claim for retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028.)

Workplace harassment not tethered to a protected status or activity, may cause psychological harm to an employee equal to harassment motivated by the employee's protected status or activity. A common term for such harassment is "workplace bullying," where the supervisor targets the employee for unjust and debilitating treatment for corrupt motives unrelated to any of the protected statuses. In such cases, the employee has no effective recourse when complaints to management "fall on deaf ears" due to the inability of the employee to identify an unlawful motivation on the part of the supervisor or co-employees. "Cronyism," as well as the unwillingness of management to investigate or take remedial action on behalf of lower level personnel perceived to be "less worthy," also tends to inhibit accountability of supervisors.

The Solution: This resolution would encourage management to demand professionalism and to provide proper training of supervisory employees with respect to the rights of employees and to insist on integrity as the guiding policy in the organization. Absent such a commitment on the part of management, employees who can demonstrate such harassment should be able to pursue legal action allowing compensatory and punitive damages and attorneys' fees. This proposed statute addresses this problem by affording legal recourse of the kind currently available to victims of harassment based on the protected statuses as set forth in the Fair Employment and Housing Act.

The language of the proposed legislation tracks the language in Government Code section 12940, subdivision (j). To avail himself or herself of the statute's protection, an employee would be required to establish the elements recognized under state and federal law to demonstrate such harassment, as well as the elements necessary for punitive damages to be imposed against the employer as required by Civil Code section 3295. Also, the "severe or pervasive" standard would need to be met in order to establish workplace harassment.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommend that legislation be sponsored to add Labor Code section 235 to read as follows:

1 § 235: Workplace Harassment Definition: Prohibition

2 (a) Notwithstanding Government Code section 12940(j), it is an unlawful employment  
3 practice for an employer, labor organization, employment agency, apprenticeship training  
4 program or any training program leading to employment, or any other person to harass an  
5 employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to  
6 a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person  
7 providing services pursuant to a contract by an employee, other than an agent or supervisor, shall  
8 be unlawful if the entity, or its agents or supervisors, knows or should have known of this  
9 conduct and fails to take immediate and appropriate corrective action. In reviewing cases  
10 involving the acts of nonemployees, the extent of the employer’s control and any other legal  
11 responsibility that the employer may have with respect to the conduct of those nonemployees  
12 shall be considered. An entity shall take all reasonable steps to prevent harassment from  
13 occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

14 (1) An employee of an entity subject to this subdivision is personally liable for any  
15 harassment prohibited by this section that is perpetrated by the employee, regardless of whether  
16 the employer or covered entity knows or should have known of the conduct and fails to take  
17 immediate and appropriate corrective action.

18 (b) For purposes of this subdivision only, “employer” means any person regularly  
19 employing one or more persons or regularly receiving the services of one or more persons  
20 providing services pursuant to a contract, or any person acting as an agent of an employer,  
21 directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The  
22 definition of “employer” in subdivision (d) of Government Code, § 12926 applies to all  
23 provisions of this section other than this subdivision.

24 (c) For purposes of this subdivision, “a person providing services pursuant to a  
25 contract” means a person who meets all of the following criteria:

26 (1) The person has the right to control the performance of the contract for services and  
27 discretion as to the manner of performance.

28 (2) The person is customarily engaged in an independently established business.

29 (3) The person has control over the time and place the work is performed, supplies the  
30 tools and instruments used in the work, and performs work that requires a particular skill not  
31 ordinarily used in the course of the employer’s work.

32 (d) Notwithstanding Government Code, § 12940(h), it shall be an unlawful employment  
33 practice for an employer or other entity covered by this part, to, in addition to the employee  
34 protections provided pursuant to Subdivision I, retaliate or otherwise discriminate against the  
35 person who has complained regarding workplace harassment, as defined herein.

36 (e) The conduct must be subjectively abusive to the person affected and objectively  
37 severe or pervasive enough to create a work environment that a reasonable person would find  
38 hostile or abusive. The conduct must also be malicious per Civil Code section 3294(c)(1).

39 (f) Management must take immediate and appropriate corrective action to investigate  
40 and eliminate any harassing conduct.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Sarah Nowels, Alan Crivaro, Richard Jallins, Elaine Alston, Fred Quiel, John Mulvana, Melissa Petrovsky, Evan Burge, Robby Robinson, Michael Kirschbaum

**IMPACT STATEMENT**

The resolution does not affect laws, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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