


OVERVIEW

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OVERVIEW OF THE PRESENTATION

This presentation will review the “Seven Habits” of frequently sued employers:

- ONE:** Failure to prevent harassment/discrimination in the workplace;
- TWO:** Meal and rest breaks are not provided as required;
- THREE:** Failure to accommodate disabled employees and conduct the interactive process;
- FOUR:** Statutorily mandated leaves of absence are not provided as required;
- FIVE:** Lack of oversight for payroll and HR software providers;
- SIX:** Outdated employee handbooks;
- SEVEN:** Termination of employees without proper assessment and documentation.

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WHY PAY ATTENTION TO THESE ISSUES: INCREASE IN JURY VERDICTS FOR EMPLOYMENT CASES IN RECENT YEARS

Some recent examples in California:

- \$167 million: Sexual Harassment and Retaliation (2012)
- \$26 million: Age Discrimination (2014)
- \$21 million: Disability Discrimination (2014)
- \$185 million: Gender and Pregnancy Discrimination (2014)
- \$18 million: Age Discrimination (2016)
- \$120 million: Rest and Meal Periods (2017)
- \$17 million: Discrimination based on perceived sexual orientation
- \$97 million: Rest Breaks (2018)
- \$3.5 million: Sexual Harassment (2018) (Settlement)
- \$15.5 million: Age Discrimination (2019)
- \$11 million: Age Discrimination (2019) (Settlement)
- \$5 million: Parental Leave Discrimination (2019) (Settlement)


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HABIT NUMBER ONE


**FAILURE TO PREVENT HARASSMENT/
DISCRIMINATION IN THE WORKPLACE**

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**#METOO ERA:
CREATING A NO TOLERANCE WORKPLACE**

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HARASSMENT

In the News

In February 2017, Susan Fowler at UBER claimed:

- Her manager propositioned her for sex;
- Her manager told her that she was “on thin ice” for reporting;
- CEO stepped down amid allegations of a “bro culture”.

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HARASSMENT

In the News

Harvey Weinstein

- Miramax film producer and studio executive
- Gwyneth Paltrow, Ashley Judd, and Angelina Jolie have alleges sexual misconduct
- Example of using a position of power to harass and proposition women

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HARASSMENT

In the News

“Weinstein ripple effect”

- Mario Batali – Batali Hospitality Group
- Steve Wynn – Wynn Resorts
- Matt Lauer – NBC
- #MeToo movement

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WHAT IS HARASSMENT?

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UNLAWFUL HARASSMENT DEFINED

What makes harassment unlawful?

- Conduct based on a _____ category

Protected

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PROTECTED CATEGORIES

- | | |
|-------------------------------|-----------------------------|
| 1. Race/Color | 10. Religion |
| 2. National Origin | 11. Pregnancy |
| 3. Ancestry | 12. Disability |
| 4. Sex/Gender | 13. Medical Condition |
| 5. Sexual Orientation | 14. Whistleblowers |
| 6. Gender Expression/Identity | 15. Military/Veteran Status |
| 7. Citizenship Status | 16. Genetic Information |
| 8. Marital Status | 17. Political Affiliation |
| 9. Age | |

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HOSTILE WORKING ENVIRONMENT

• Most harassment cases involve claims of *hostile working environment*, which is:

- Unwelcome behavior;
- Offensive to the reasonable man or woman;
- Severe or pervasive; and
- Alters working conditions to create an abusive working environment.

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HOSTILE WORKING ENVIRONMENT

Due to the challenges associated with disproving harassment claims, your company should have a **zero tolerance policy.**

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ABUSIVE CONDUCT

- Abusive conduct can lead to claims of harassing conduct.
- Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, yelling, use of profanity, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or undermining of a person's work performance.
- Managers and supervisors must be trained on this.

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A LOOK AT RECENT DEVELOPMENTS IN NEW YORK

- Statute of limitations increased to 3 years for sexual harassment claims;
- Bans arbitration agreements for all discrimination claims;
- Expands definition of employer, includes all workers (independent contractors);
- Eliminates "severe or pervasive" standard and replaces it with subjected to "inferior" terms of employment;
- Prohibits non-disclosure agreements.

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NEW ME-TOO LAWS IN CALIFORNIA AS OF 2019

- AB 2770: Defamation Protection
- AB 3109: Bans Agreements That Prevent Party From Testifying
- SB 820: Bans Non-Disclosure Agreements
- SB 826: Requires female board members
- SB 1300: Numerous provisions including a single incident may be sufficient to create a triable issue re a hostile working environment
- SB 1343: Expanded harassment training requirements

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HABIT NUMBER TWO

MEAL AND REST BREAKS ARE NOT PROVIDED AS REQUIRED

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REST BREAKS

Remember:

1. Must be provided every 4 hours or major fraction thereof, defined as 2 hours;
2. Must be uninterrupted;
3. May be taken away from the worksite;
4. Should employers track rest breaks?

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KEY CASE: AUGUSTUS V. ABM SECURITY SERVICES, INC.

- ABM Security Services employs security guards and required them to remain on-call even while taking their rest breaks.
- The California Supreme Court concluded that the on-call rest break policy violates California law. The nature of rest breaks requires employees to be relieved of all duties.
- The mere possibility of being called back does not invalidate breaks.
- Limited DLSE exemption process for on-duty rest breaks if there would be an undue hardship for employer.

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TAKEAWAYS

- Rest period policies must be updated to explicitly state that employees are relieved of all duty.
- Need to implement policies and procedures to dissuade inference that field employees, with cell phones or dispatch equipment, are “on-call” on their rest break (i.e. advise them to turn off devices during rest period).
- Increasing importance to have acknowledgement in timekeeping system or timesheets that uninterrupted rest periods have been provided.

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MEAL BREAKS

- A 30 minute uninterrupted meal break is required for every 5 hours worked;
- 1st meal period is required by 5.0 hours of an 8 hour shift, unless the employee will not work more than 6.0 hours and the employee has signed a meal period waiver;
- 2nd meal period is required by 10.0 hours unless a meal period waiver is signed by the employee, the employee does not work more than 12 hours, and the employee took the first meal period.


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HABIT NUMBER THREE

**FAILURE TO ACCOMMODATE
DISABLED EMPLOYEES AND
CONDUCT THE INTERACTIVE
PROCESS AS REQUIRED**


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THE INTERACTIVE PROCESS

- Employers often make decisions about work restrictions, return to work, and extended leave without involving the employee in the decision making process pursuant to an interactive process.


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REASONABLE ACCOMMODATION

- If an employer is on notice that an employee needs a reasonable accommodation to perform the essential functions of the job an interactive process must be scheduled to review possible accommodations;
- Extended leave as an accommodation may be required;
- Ability to work at home may be a reasonable accommodation;
- Undue hardship is difficult to establish;
- Job descriptions should be current, accurate and detail the essential functions of the job.


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HABIT NUMBER FOUR

STATUTORILY MANDATED LEAVES OF ABSENCE ARE NOT PROVIDED AS REQUIRED

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THERE ARE NUMEROUS STATUTORILY MANDATED LEAVES INCLUDING:

- Family and medical leave pursuant to the Family and Medical Leave Act/California Family Rights Act;
- Pregnancy Disability Leave;
- Military related leave;
- School Activities and Emergency Childcare Leave
- Domestic Violence related leave
- Crime Victims Leave
- Rehabilitation Leave


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EMPLOYERS MUST UNDERSTAND...

1. What are the leave laws?;
2. Are they covered by the leave law;
3. Which employees are eligible and the eligibility criteria;
4. How much leave is required;
5. Are there benefit continuation requirements?;
6. What are the notice requirements?;
7. What are the employer's reinstatement obligations?;
8. What are the penalties for violations?


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HABIT NUMBER FIVE

**LACK OF OVERSIGHT FOR PAYROLL
AND HR SOFTWARE PROVIDERS**


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PAYROLL AND SOFTWARE PROGRAMS

- Third party administrators for payroll and other HR functions can be extremely helpful for employers;
- However, employers must still ensure that the proper data, policies, and procedures are in place;
- Examples.


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HABIT NUMBER SIX

OUTDATED EMPLOYEE HANDBOOKS

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EMPLOYEE HANDBOOKS BEST PRACTICES

- Due to changes in employment laws, and changing workplace needs, employee handbooks should be updated and reviewed by counsel every year.
- Employee handbooks should be tailored to the employer's specific needs;
- Question: What are the pros and cons associated with electronic employee handbooks?

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HABIT NUMBER SEVEN

TERMINATION OF EMPLOYEES WITHOUT PROPER ASSESSMENT AND DOCUMENTATION

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10 KEY TERMINATION RISKS

The following are 10 key termination risks:


1. Failure to consider the protected status of an employee (e.g. disability, age, religion, gender, race; pregnancy);
2. Failure to properly and timely respond to and document personnel issues and violations of company policy;
3. Failure to consistently and uniformly apply disciplinary measures;
4. Failure to engage in the interactive process when required;
5. Failure to comply with applicable wage and hour laws;
6. Failure to properly investigate a workplace complaint before terminating an employee;
7. Failure to grant an extended leave as an accommodation;
8. Failure to treat the employee fairly;
9. Failure to consider input from other executive/administrative personnel on the termination decision;
10. Failure to exercise patience when considering an employee termination.

Remember: Termination should rarely be a surprise.


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CONCLUSION



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SPEAKER BIOS



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BERNADETTE M. O'BRIEN, ESQ., SPHR


Bernadette M. O'Brien is a Partner at Floyd Skeren Manukian Langevin, LLP and SPHR/SHRM-SCP certified. Ms. O'Brien serves as counsel and advisor to the law firm's Human Resources Department and is Managing Attorney of the firm's Employment Law Department. Ms. O'Brien specializes in human resources consultation, compliance guidance, and policy implementation.

Ms. O'Brien defends employers in employment related disputes before the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, and the California Labor Commissioner, including claims related to discrimination, harassment, retaliation, wage and hour, and leave of absence laws. Ms. O'Brien provides HR consultation to employers, human resource administrators, and risk managers on numerous HR topics including compliance with federal, state and local employment related laws; HR policy development including employee handbooks; personnel management including hiring, performance, discipline, and termination; ensuring EEO compliance; managing disability and leave of absence policies and procedures; and, wage and hour compliance. Ms. O'Brien also conducts management and employee training sessions throughout California.

Ms. O'Brien is author of the LexisNexis publication *Labor and Employment in California: A Guide to Employment Laws, Regulations and Practices*, co-author of *California Leave Law: A Practical Guide for Employers*, and co-author of *California Unemployment Insurance and Disability Compensation Programs*. She is also editor of Floyd Skeren Manukian Langevin's employment related websites: www.employmentlawweekly.com, www.worklawreport.com, and www.floydskerenhrtraining.com, which provide the latest news and information related to employment law.

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ALDEN J. PARKER, ESQ.

Alden Parker is the managing partner of the firm's Sacramento office and the co-chair of the Hospitality Industry Group. Alden represents employers in all facets of employment law matters. He has considerable experience defending employers in litigation involving claims under the California Fair Employment and Housing Act (FEHA), California's wage and hour laws, Family and Medical Leave Act (FMLA), California Family Rights Act (CFRA), and the Age Discrimination in Employment Act (ADEA). Alden has also defended employers against whistleblowing and retaliation claims, including claims under the California Whistleblower Act and various provisions of the California Labor Code.

Alden has extensive experience defending employers in federal and state court, as well as in investigations by the Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), United States Department of Labor (DOL) and the National Labor Relations Board (NLRB).

In addition to defending his clients in litigation, Alden frequently counsels employers to assist them in avoiding litigation. He regularly advises clients on leave management issues and the interactive process for employees with disabilities, reinstatement obligations under various leave laws and wage and hour compliance. Alden has prepared employee handbooks and a variety of agreements, including independent contractor, employment, confidentiality and trade secrets agreements.

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