



A Guide to
**Federal and California State
Sexual Discrimination,
Harassment, and Assault Laws**



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I. Sex-Based Discrimination

A. Sex-Based Discrimination under Federal Law

1. *Title VII: Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, et seq.)*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex.¹ In general, Title VII applies to employers with 15 or more employees.

Disparate Treatment

Disparate treatment is the most common theory under which plaintiffs bring discrimination claims. This theory requires a plaintiff to show that the employer had a discriminatory motive. A defendant may attempt to rebut that presumption by showing that their actions had a nondiscriminatory purpose.²

Elements of Disparate Treatment Under Title VII:³

1. Member of a protected class (ex: women)
2. Who is qualified for the position
3. Suffers an adverse employment action (ex: termination or demotion)
4. Under circumstances that suggest a discriminatory motive.

Example:

- Female employees sued their employer, alleging that employer's "Fetal Protection Policy," which mandated that pregnant women or women capable of bearing children be excluded from jobs involving lead exposure, constituted sex discrimination in violation of Title VII. One woman became sterilized to avoid losing her job; another was transferred to a different position for which she was paid a lower salary. Employer could not establish that the policy's exclusion on the basis of sex related to a bona fide occupational qualification, and it was thus found to be discriminatory.⁴

Disparate Impact

Unlike disparate treatment, disparate impact does not require a plaintiff to allege that the defendant acted with a discriminatory motive or intent. Rather, the plaintiff must allege facts to show that, no matter the motive, a facially neutral policy did in fact lead to discriminatory results in its application. Plaintiffs often rely on statistical evidence to prove disparate impact.⁵ If the plaintiff successfully proves disparate impact, the defendant must then show that the policy is necessary for business in order to defeat the claim.⁶

Elements of Disparate Impact Under Title VII:⁷

1. Policy that is neutral on its face
2. Has a discriminatory impact in practice because it disproportionately and adversely impacts a protected group.

Examples:

- Five women were denied paramedic jobs in Chicago. Chicago had implemented a physical-skills test for potential hires, which, between 2000 and 2009, 98% of male applicants and only 60% of female applicants passed. Plaintiffs prevailed on a disparate impact claim because Chicago

failed to establish that skills tested reflected “important elements of job performance,” rather than sex discrimination.⁸

- Plaintiffs filed a Title VII suit claiming disparate impact on the basis of sex after they applied for a promotion. Initially, all of the female applicants were denied an interview. After additional screenings, several female employees were interviewed and one female employee was promoted to the position in question. The court found that plaintiffs failed to show discriminatory impact, because the promotion rate of female applicants exceeded the promotion rate of male applicants.⁹

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) prior to commencing a civil action in federal court.¹⁰ A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if plaintiff institutes proceedings “with a state or local agency with authority to grant or seek relief from such practice.”¹¹

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within 90 days.

2. Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)

Title IX of the Education Amendments of 1971 is a federal law that prohibits sex discrimination by any federally funded education program or activity. Most schools, including many private schools, receive some federal funds and are thus subject to Title IX. The Department of Education’s Office of Civil Rights (OCR) enforces Title IX.

The statutory language, in pertinent part, states, “No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹²

Who does Title IX apply to?

Title IX applies to any education institution that receives money from the federal government. This includes institutions such as colleges, universities, elementary schools, secondary schools, as well as education or training programs (e.g., interscholastic, intercollegiate, club, or intramural athletics offered by the institution).¹³

- Responsible Employees—employees with the authority to take action to address sexual misconduct—have a duty to report such misconduct by students or employees.¹⁴

Elements of a Cause of Action for Discrimination under Title IX:¹⁵

1. An intentional act of ***discrimination***¹⁶
2. On the basis of sex.

Discrimination: Discrimination under Title IX is broadly construed and includes retaliation. Actions not expressly mentioned in the statute have been found to be discriminatory.¹⁷

Examples:

- A girls' basketball coach complained that his team was receiving less funding and less access to equipment and facilities than the boys' team and was eventually fired. He sued the Board of Education, claiming retaliation in violation of Title IX's prohibition against discrimination on the basis of sex. The Supreme Court found that he was discriminated against "on the basis of sex," because the retaliation against him occurred as a result of his allegations of sex discrimination.¹⁸
- A school violated Title IX where opportunities for sports participation were not provided equally for male and female students, female students were underrepresented among athletes, and the high school could not show a continuing practice of program expansion to "fully and effectively accommodate" the interests and abilities of female students.¹⁹

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions.²⁰ In California, a person must file a lawsuit under Title IX within 2 years of a discriminatory act.

Note: Unlike claims brought under Title VII, Title IX has no requirement that a claim first be brought before an administrative agency before a lawsuit can be filed.

3. *Equal Pay Act (29 U.S.C. § 206(d)(1))*

The Equal Pay Act protects the rights of employees to be free from pay discrimination on the basis of sex.

Elements of a Cause of Action under the Equal Pay Act:²¹

1. The employer pays different wages to employees of the opposite sex
2. For ***substantially equal*** work
3. Such differential in payment is not based on:
 - a. A seniority system
 - b. A merit system
 - c. A system which measures earnings by quantity or quality of production
 - d. A differential based on any other factor other than sex

Substantially Equal: To be eligible for equal pay, jobs held by employees of the opposite sex must be substantially equal, rather than identical. Inconsequential differences between the positions may be disregarded, but the positions must require similar skills, effort, and responsibility to be performed under similar conditions.²²

- Actual performance requirements, rather than job classifications or titles, are determinative.²³

Examples:

- Female prison matrons and male prison guards were found not to be in substantially similar jobs because each male guard was responsible for guarding a substantially larger number of prisoners than each matron and the matrons did substantially more clerical work than the male guards.²⁴
- Fresno County Office of Education paid plaintiff Eileen Rizo less than comparable male employees for the same work. Fresno argued that the employees' prior salary was a "factor

other than sex” under the Equal Pay Act that can justify a wage differential. The Ninth Circuit held that an employer may not justify a wage differential between male and female employees by relying on prior salary, either alone or in combination with other factors.²⁵

Statute of Limitations

Two years. Three years in instances of willful discrimination.²⁶ For a violation to be “willful,” and the three-year statute of limitations period to apply, the plaintiff must show that the employer either knew or recklessly disregarded whether its conduct was prohibited by the statute.²⁷

B. Sex-Based Discrimination under California Law

1. Fair Employment and Housing Act (FEHA) (Cal. Gov’t Code §§ 12900-12996)

*FEHA has considerable overlap with Title VII. However, FEHA is broader in scope, meaning that an employer could be liable under FEHA but not under Title VII. California courts look to federal law when applying FEHA, so the standards are substantially similar.*²⁸

Disparate Treatment

Disparate treatment is the most common theory under which plaintiffs bring discrimination claims. This theory requires a plaintiff to show that the employer had a discriminatory motive. To avoid liability, the defendant must show that their actions had a nondiscriminatory purpose.²⁹

Elements of a Cause of Action for Disparate Treatment:³⁰

1. Member of a protected class (ex: women)
2. Qualified for the position
3. Adverse employment action (ex: firing or demotion)
4. Circumstances that suggest a discriminatory motive

Example:

- An engineer for the Public Utilities Commission of the City and County of San Francisco was subjected to a variety of discriminatory actions at work. The court found that the plaintiff succeeded in pleading a prima facie case of disparate treatment by showing the engineer satisfied the four elements: Plaintiff was an African-American woman of Choctaw and Chickasaw ancestry; she was qualified for the position; she received unwarranted negative evaluations and was relocated to an inferior position; and she was treated differently than her colleagues who did not belong to the same protected classes.³¹

Disparate Impact

Disparate impact does not require plaintiff to allege that defendant acted with a discriminatory motive or intent. Rather, plaintiff must allege facts to show that, no matter the motive, a facially neutral policy did in fact lead to discriminatory results in its application. To avoid liability, the defendant must show that the policy is necessary for a business purpose.³²

Elements of a Cause of Action for Disparate Impact:³³

1. Policy that is neutral on its face

2. Impact of neutral policy is, in practice, discriminatory because it disproportionately adversely impacts a protected group (e.g., women).

Example:

- A woman sued the City of San Diego under both Title VII and FEHA, alleging that the City's failure to promote her to a permanent lifeguard position was based on her sex.³⁴ She alleged that, after she complained, the City retaliated against her in violation of Title VII and FEHA by not scheduling her for summer lifeguarding. The court found that she stated a prima facie claim of disparate impact gender discrimination by submitting a statistician's expert report that concluded "that female lifeguards are disparately impacted by the promotion process used by the City."³⁵

Exhaustion of Administrative Remedies/Statute of Limitations

Before a FEHA claim can proceed to court, a complaint must be filed with the California Department of Fair Employment and Housing (DFEH). You have one year from the occurrence of a discriminatory act to file a complaint with DFEH.

2. California Fair Pay Act (Cal. Labor Code § 1197.5)

The California Fair Pay Act prohibits employers from paying employees lower wages for work that is substantially similar to the work of higher paid employees of the opposite sex.

Elements of a California Fair Pay Act Claim:³⁶

1. Employer paid lower wages to an employee, compared to employees of the opposite sex
2. For substantially similar work, when viewed as a composite of skill, effort and responsibility
3. Without demonstrating an appropriate ***exception*** applies.

Exceptions: An employer may pay an employee a lower rate than that paid to employees of the opposite sex if the wage differential is reasonably based upon one or more of the following factors:³⁷

- (a) A seniority system
- (b) A merit system
- (c) A system that measures earnings by quantity or quality of production
- (d) A bona fide factor other than sex, such as education, training, or experience.

Example:

- A construction superintendent successfully demonstrated that she was paid less than a newly-hired male employee with the same position. She further demonstrated that, subsequent to her departure from the company, her male replacement was paid more than she had been paid. This constituted prima facie evidence of unequal pay.³⁸ Nevertheless, her employer successfully established that a business reason other than sex led to the wage differential, stating that the unequal pay was based on differences in prior work experience between the relevant employees.³⁹

Statute of Limitations

A claim alleging a violation of the California Fair Pay Act must be filed within two years of the alleged discrimination.⁴⁰

3. *Unruh Civil Rights Act (Cal. Civ. Code § 51)*

The Unruh Civil Rights Act states that all persons are entitled to free and equal accommodations in all business establishments of any kind.

The statutory language, in pertinent part, states the following:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁴¹

Elements of a Cause of Action under the Unruh Act:⁴²

1. Denial of full or equal accommodations, advantages, facilities, privileges or services
2. Because of sex
3. By any business establishment.⁴³

Example:

- Sex based price discounts on car washes were held to be arbitrary discrimination prohibited by the Unruh Act.⁴⁴
- Male night club patrons were charged higher admission because of their sex. It was not necessary to prove they had been denied specifically-requested equal treatment to bring a claim under the Act.⁴⁵ Any plaintiff who has “suffered an invasion of legally protected interests” may do so.⁴⁶

Statute of Limitations

Courts are divided as to whether the statute of limitations is two years (as for personal injury) or three years (as for liability created by statute).⁴⁷

II. Sexual Harassment

What Is Harassment?

Sexual harassment has been defined as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁴⁸ Sexual harassment may include any of the following behaviors:⁴⁹

- Verbal harassment: May include epithets, derogatory comments or slurs (or repeated romantic overtures, sexual comments and jokes or prying into one’s personal affairs).
- Physical harassment: May include unwanted touching, rubbing against someone, assault and physical interference with movement or work.
- Visual harassment: May include derogatory cartoons, drawings or posters, or lewd gestures.

A. Sexual Harassment Under Federal Law

1. Title VII: Harassment in Workplace (42 U.S.C. § 2000e et. seq)

Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits discrimination based on statutorily enumerated categories, including sexual harassment.

The statutory language, in pertinent part, states the following:

It shall be an unlawful employment practice for an employer—...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁵⁰

Although the statutory text does not expressly include sexual harassment, the Equal Employment Opportunity Commission (EEOC) has interpreted sexual harassment as a type of sexual discrimination that is prohibited by Title VII. Additionally, the Supreme Court has upheld the EEOC's view of sexual harassment as a type of sexual discrimination.⁵¹ Federal regulations explicitly state that "[h]arassment on the basis of sex is a violation of section 703 of [T]itle VII."⁵²

Who does this statute apply to?

Title VII applies to employers with 15 or more employees.⁵³

Hostile Work Environment

Hostile work environment is a theory under which a plaintiff can bring a sexual harassment claim. Hostile work environment sexual harassment is characterized as conduct that has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive environment.⁵⁴

In order for a plaintiff to prevail on a hostile work environment sexual harassment claim, the plaintiff must prove the following elements:⁵⁵

1. The employee belongs to a **protected group**;
2. The employee was subjected to **unwelcome sexual harassment**;
3. The harassment complained of was **based on sex**; and
4. The harassment complained of affected a term or condition or privilege of employment in that it was **sufficiently severe or pervasive** to "alter the conditions of the victim's employment and create an abusive working environment"⁵⁶
5. From an **objective and subjective perspective**.⁵⁷

Unwelcome Sexual Harassment: The complained of sexual harassment must be unwelcome. Examples of unwelcome advances, conduct, or comments that may create a hostile work environment include:

- **Sexual advances or propositions:** Unwelcome sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment, even where an employee "voluntarily" engages in a sexual relationship out of fear of losing her job.⁵⁸
- **Unwanted touching:** Even without express sexual propositions, a hostile environment claim may arise where an employee is subjected to unwanted touching, such as fondling or touching in an offensive manner.⁵⁹

- **Leering:** A supervisor or coworker's regular staring at a female employee's breasts, for example, may give rise to a hostile environment claim.⁶⁰
- **Verbal harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone's appearance or body.⁶¹
- **Nonsexual hostile conduct:** If hostile, but nonsexual conduct is directed at an employee because of her sex or gender, it may give rise to a hostile environment claim.⁶²

Based on Sex: The harassment complained of must be based on the plaintiff's sex (i.e. the plaintiff's gender).⁶³

- **Sex or gender does not need to be the sole reason:** A victim must show that sex or gender is a substantial motivating factor in the unwelcome conduct. However, there may be other motivating factors.⁶⁴
- **Generally vulgar language is not necessarily "because of sex":** The general use of vulgar gender-related language in the workplace, when not directed at plaintiff, is not necessarily "because of sex."⁶⁵

Sufficiently Severe or Pervasive: The harassment must have been either so severe or pervasive, so as to alter the conditions of the victim's employment and create an abusive environment.⁶⁶

- There is no bright line rule as to what specific conduct satisfies the threshold for severe or pervasive.⁶⁷ However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive.⁶⁸ Rather, the court will look at the totality of the circumstances to make this determination.⁶⁹
- In evaluating the totality of the circumstances, courts have looked at the following factors:⁷⁰
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee's work performance.

Objective and Subjective Perspective: The sexual harassment complained of must be sufficiently severe or pervasive both from an objective and a subjective perspective.⁷¹

- To satisfy the objective perspective standard, the reasonable person standard is employed by courts (i.e., would a reasonable person find the work environment hostile or abusive?).
- In order to satisfy the subjective perspective standard, the plaintiff himself or herself must find the work environment hostile or abusive because of the sexual harassment.

Quid Pro Quo

Quid pro quo is an alternative theory under which a plaintiff can bring a sexual harassment claim. Quid pro quo sexual harassment is characterized as an employee's submission to conduct that is either (1) made a term or a condition of employment; or (2) forms a basis for employment decisions affecting that individual. Put another way, quid pro quo sexual harassment is "harassment that involves the conditioning of concrete employment benefits on sexual favors."⁷²

In order for a plaintiff to prevail on a quid pro quo sexual harassment claim under Title VII, the plaintiff must prove the following elements:⁷³

1. The employee belonged to a protected group;
2. The employee was subject to unwelcome sexual harassment;

3. The harassment complained of was based on sex; and
4. The employee's reaction to the unwelcome behavior affected *tangible aspects* of the employee's compensation, terms, conditions, or privileges of employment

The first three requirements under this theory directly match those for a hostile work environment sexual harassment claim. However, the last requirement under this theory of sexual harassment is different.

Tangible Aspects: The employee's reaction to the unwelcome behavior must have resulted in some tangible employment action. Thus, the supervisor's express or implied threat must be carried out.⁷⁴

When Is an Employer Liable?

Hostile Work Environment

A hostile work environment sexual harassment claim presents a different liability scheme for employers based on the status of the harassing employee.

- If the harassing employee is the plaintiff's **supervisor** (i.e., a person who has the authority to take tangible employment actions against the employee), the employer will be held vicariously liable for the sexual harassment. However, the employer can potentially assert an affirmative defense. The employer can only escape liability if it can prove: "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁷⁵
- If the harassing employee is a **co-worker** of the plaintiff, then the burden is on the plaintiff to prove that the employer was negligent in order for the employer to be held liable. To prove that the employer was negligent, the plaintiff must demonstrate that the employer knew or should have known of the harassment and subsequently failed to take prompt, effective, corrective action.⁷⁶

Quid Pro Quo

Under a quid pro quo sexual harassment claim, the employer is strictly liable for the conduct of supervisory employees that he or she has authority over hiring, advancement, dismissal and discipline under the common-law theory of respondeat superior.⁷⁷

Examples:

- An employee's allegations were sufficient to state a claim of a hostile work environment against her employer and supervisor where her supervisor asked her to have sexual relations with him and made sexual advances (e.g., caressed her on the job, followed her to the ladies' room when she was there alone, and exposed himself to her) towards the employee during and after business hours. Employee also testified that the bank supervisor assaulted and raped her.⁷⁸
- An employee's allegations were insufficient to state a claim of hostile work environment sexual harassment where the alleged harassment consisted of an isolated incident where the employee's supervisor read a comment aloud about the employee ("I hear making love to you is like making love to the Grand Canyon") and the supervisor and another employee laughed.⁷⁹

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the EEOC prior to commencing a civil action in federal court.⁸⁰ A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if plaintiff institutes proceedings "with a state or local agency with authority to grant or seek relief from such practice."⁸¹

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the "right to sue" letter is received, a lawsuit must be filed within 90 days.⁸²

2. Title VII: Retaliation (42 U.S.C. § 2000e-3(a))

Title VII prohibits employers from retaliating against current or former employees who exercise their rights guaranteed under the statute. In addition, Title VII prevents employers from retaliating against current or former employees who participate in any investigation, proceeding, or hearing.

The statutory language, in pertinent part, states the following:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.⁸³

Elements of the Cause of Action:

In order for the plaintiff to establish a claim for retaliation under Title VII, the plaintiff must prove the following elements:⁸⁴

1. The plaintiff engaged in a **protected conduct**;
2. The plaintiff was thereafter subject to a **material adverse employment action**; and
3. A **causal connection** exists between the protected conduct and the adverse action.

Protected conduct: There are two types of protected activity. These are (1) the **opposition** clause and (2) the **participation** clause.⁸⁵

- Under the opposition clause, employers cannot discriminate against employees who have **opposed an unlawful employment practice** proscribed by Title VII, such as through informal protests, complaints to the employer, or utilization of employer grievance procedures.
- Under the participation clause, employers cannot discriminate against employees who have "made a charge, testified, assisted, or **participated in any manner** in an investigation, or proceeding, or hearing" under Title VII.⁸⁶ Additionally, a plaintiff may prevail on a claim of retaliation even if the original claim of sexual harassment is not proven.

Material adverse employment action: Plaintiff must have suffered a material adverse employment action. A material adverse employment action includes being fired, demoted, suspended, denied a promotion, reassigned to an unfavorable job, or any other adverse employment decision or treatment that would likely "dissuade a reasonable worker from making or supporting a charge of discrimination."⁸⁷

Causal Connection: There must be a causal connection between the protected conduct and the material adverse employment action. The causal connection can be proven indirectly through circumstantial evidence. Temporal proximity between employer’s knowledge of protected activity and the alleged adverse employment action must be “very close.”⁸⁸

Affirmative Defenses

An employer can assert the same affirmative defenses for a retaliation claim under Title VII as for claims of supervisor sexual harassment. That is, the employer can escape liability by showing:⁸⁹

1. That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and
2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.

Examples:

- An employee of a railroad company (the only female worker) sufficiently stated a retaliation claim under Title VII where the employee was reassigned to duties that were more arduous and dirtier than the employee’s current forklift operator duties after the employee complained of sex discrimination by her supervisor. The court found that this reassignment of duties illustrated that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination.⁹⁰
- Military veteran’s allegations that he was retaliated against for filing an EEOC charge and civil complaint in the form of a mediocre performance evaluation were insufficient to state a claim of retaliation against defendant Secretary of the Navy because these performance evaluations were not relied upon in making a further materially adverse employment action (e.g., no meaningful change in work assignments) against the military veteran. Therefore, the mediocre performance evaluations did not rise to the level of materially adverse employment action that would satisfy unlawful retaliation.⁹¹

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the EEOC prior to commencing a civil action in federal court. A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if plaintiff institutes proceedings “with a state or local agency with authority to grant or seek relief from such practice.”⁹²

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within 90 days.⁹³

3. Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)

Sexual harassment is a form of sex discrimination prohibited by Title IX.⁹⁴ Whether gender-oriented conduct rises to the level of harassment is a context-driven determination.⁹⁵

Elements of the Cause of Action for Sexual Harassment under Title IX:⁹⁶

1. The school exercised ***substantial control*** over both the harasser and the context in which the harassment occurred.

2. The plaintiff suffered assault that is so *severe, pervasive, and objectively offensive* that it can be said to *deprive the plaintiff of access* to the educational opportunities or benefits provided by the school.
3. The harassment was committed on the basis of sex.
4. The school had *actual knowledge* of the harassment.
5. The school responded with *deliberate indifference*.
6. The school's deliberate indifference must have subjected the plaintiff to further harassment or made the plaintiff liable or vulnerable to it.

Substantial Control: The harasser must have been under the school's disciplinary authority.⁹⁷ The assault must have occurred during school hours and on school grounds.⁹⁸

Severe, Pervasive, and Objectively Offensive: Conduct under Title IX must be so severe, pervasive, and objectively offensive that it deprives the plaintiff of access to educational opportunities or benefits provided by the school.⁹⁹

- A single occurrence of sexual assault may satisfy this requirement where "sufficiently serious" or particularly severe.¹⁰⁰
- To show deprivation of access, it is not necessary to show that a victim was physically excluded from educational opportunities or benefits. Sufficient examples may include demonstrating dropping grades, being diagnosed with behavioral and/or anxiety disorders, becoming homebound or hospitalized due to harassment, physical violence, or sexual assault.¹⁰¹

Actual Knowledge: An institution can be held liable under Title IX only where it had actual knowledge of the harassment.¹⁰² An appropriate school official, who had authority to take remedial measures, must have had knowledge of the harassment.¹⁰³ The official must respond to the misconduct "in a manner that is not clearly unreasonable."¹⁰⁴

Example:

- An institution's awareness of a "general problem of sexual violence against its students," combined with deficient corrective measures, was not sufficient to establish actual knowledge or deliberate indifference for a Title IX claim.¹⁰⁵

Deliberate Indifference: Plaintiff must prove that the school district's response amounted to deliberate indifference.¹⁰⁶ A school district is deemed to act with deliberate indifference when, after notice of the sexual harassment, either its actions are grossly inadequate or it does not take any action at all, and through its inadequate action or its lack of action, it effectively causes the student damage.¹⁰⁷

- A plaintiff must show that the school district or university's response was deficient, rather than merely negligent, lazy, or careless.¹⁰⁸

Examples:

- Deliberate indifference could be found where the school board made no effort to either investigate or to put an end to the harassment once given notice of it.¹⁰⁹
- A high school student and her parents' allegations of sexual harassment by the student's teacher were insufficient to state a claim under Title IX against the school district where there was no evidence that any school official was aware of the harassment.¹¹⁰
- Student's allegations of sexual harassment during a football camp were sufficient to state a claim under Title IX against the school district where the coach of the football camp, who had

the authority to take corrective action, witnessed the sexual harassment and only verbally reprimanded the harassing students.¹¹¹

Note: Courts often look to cases interpreting the Civil Rights Act statute, Section 1983, from which Title IX was based, in determining what constitutes “deliberate indifference” in specific cases.¹¹²

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions.¹¹³ In California, a person must file a Title IX lawsuit within 2 years of a discriminatory act.¹¹⁴

Note: Unlike claims brought under Title VII, Title IX has no requirement that a claim first be brought before an administrative agency before a lawsuit can be filed.

B. Sexual Harassment Under California Law

1. FEHA: Harassment in the Workplace (Cal. Gov’t Code § 12940(j))

In California, the Fair Employment and Housing Act (FEHA) makes it unlawful for any employer to harass an employee or job applicant because of sex. Harassment because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy or childbirth.

The statutory language, in pertinent part, states the following:

It is an unlawful employment practice ... [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of ... sex, gender, gender identity, gender expression ... to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.¹¹⁵

Title VII case law generally applies

Where FEHA and Title VII are similar, California looks to Title VII federal case law to interpret FEHA.¹¹⁶ Yet FEHA is more expansive than Title VII in important respects.¹¹⁷

- FEHA specifically prohibits sexual harassment and retaliation, not just sex-based discrimination.
- FEHA applies to all employers, regardless of number of employees.
- FEHA protects independent contractors, unpaid interns, and volunteers.¹¹⁸

Gender of the harasser may be same as victim

In California, a cause of action for sexual harassment may be stated by a person of the same gender as her or his harasser.¹¹⁹

Hostile Work Environment

Elements of the Cause of Action for FEHA Hostile Work Environment:¹²⁰

As under Title VII, an employee may have a claim for sexual harassment under a “hostile work environment” theory if she encounters sexual conduct in her workplace that interferes with her work

performance or creates an intimidating, hostile, or offensive working environment. The elements of the cause of action mirror the Title VII elements:

1. The employee is a member of a *protected category*.
2. The employee was subjected to *unwelcome sexual advances, conduct, or comments*.
3. The unwelcome conduct complained of was *because of the employee's sex*.
4. The conduct was *sufficiently severe or pervasive* to alter the conditions of plaintiff's employment and create a hostile or abusive work environment.

Protected Category: Like Title VII, FEHA prohibits discrimination and harassment against individuals based on a protected category. These categories include sex, gender, gender identity, gender expression, and sexual orientation, as well as race, color, religion, national origin, age, etc.

Unwelcome sexual advances, conduct, or comments: The same types of behavior may constitute unwelcome advances, conduct, or comments under either FEHA or Title VII. These behaviors may include, but are not limited to:

- **Sexual Advances or Propositions:** Sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment.
- **Unwanted Touching:** This may include intentional and repeated rubbing up against another's body or touching her in an offensive manner.
- **Verbal Harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone's appearance or body.¹²¹
- **Nonsexual Hostile Conduct:** This refers to hostile conduct that is not sexual in nature, but that is directed at an employee because of her sex or gender.¹²²

Because of employee's sex: The harassment complained of must be based on the plaintiff's sex (i.e. the plaintiff's gender).¹²³

- **Sex/gender does not need to be the sole reason:** As with Title VII claims, the unwelcome conduct may be motivated by factors other than sex or gender.
- **Generally vulgar language is not necessarily "because of sex":** As under federal law, the general use of vulgar gender-related language in the workplace, when not directed at plaintiff, is not necessarily "because of sex."¹²⁴
- **"Because of sex" applies to any gender.** Harassment because of sex is not limited to women.¹²⁵

Sufficiently Severe or Pervasive: California courts adopt the definitions of "severe" and "pervasive" developed under Title VII.¹²⁶ The harassment must have been either so severe or so pervasive, so as to alter the conditions of the victim's employment and create an abusive environment.¹²⁷

- There is no bright line rule as to what specific conduct satisfies the threshold for severe or pervasive.¹²⁸ However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive.¹²⁹ Rather, the court will look at the totality of the circumstances to make this determination.¹³⁰
- In evaluating the totality of the circumstances, courts have looked at the following factors:¹³¹
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee's work performance.

- As under Title VII, it is not enough that the victim perceives the sexual conduct as severe or pervasive. The objective severity of harassment must also be determined from the perspective of a reasonable person in the victim's position.¹³²

Examples:

- Conduct may be sufficiently pervasive when it conveys a negative message about a woman's role in the workplace, or when it conveys that women must engage in sexual conduct to succeed in the workplace. A manager promised and granted unfair employment benefits to female subordinates who were his sexual partners. These benefits were not granted to plaintiffs, who were also female. This was relevant to show conduct pervasive enough to create a hostile work environment.¹³³
- Employee at a hospital, said she had seen a doctor sexually harass three fellow employees, but did not describe the incidents or allege a repeated or routine pattern of behavior. As pleaded, the doctor's conduct was not sufficiently severe or pervasive to create a hostile work environment for the employee herself.¹³⁴
- An employee complained that her coworkers made sexual comments about other women's bodies outside their presence on five to nine occasions over four months. This was held not to be sufficiently severe or pervasive.¹³⁵

Quid Pro Quo Harassment

Elements of the Cause of Action for Quid Pro Quo Harassment:¹³⁶

California adopts Title VII case law for quid pro quo harassment claims, and the elements of the cause of action are equivalent to Title VII's:

1. The employee is a member of a protected group.
2. The employee is subjected to unwelcome sexual advances, conduct, or comments.
3. The unwelcome conduct complained of was because of employee's sex.
4. The employee's reaction to the sexual conduct affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.

Example:

- Supervisor proposed to his employee that they have an extramarital affair, telling her that if she consented she could have any job she wanted when the company was reorganized.¹³⁷

When Is an Employer Liable?

Under either theory of FEHA workplace sexual harassment, an employer may be liable for harassment of an employee by her supervisor or by a non-supervising coworker.

The statutory language, in pertinent part, states the following:

"[E]mployer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.¹³⁸

It is an unlawful employment practice ... [f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.¹³⁹

As under Title VII, an employer can escape liability for some damages if it took reasonable steps to prevent workplace harassment and the employee unreasonably failed to use preventive and corrective measures that the employer provided, if those measures would have prevented any of the employee's harm.¹⁴⁰

Example:

- Employee did not report her harassment by her supervisor to management until it had continued for two years. The employer was still liable for the supervisor's harassment, but the employee's damages were limited because she had not reasonably taken advantage of the reporting policies put in place by the employer.¹⁴¹

Supervisory Harassment: As under Title VII, when an employee is harassed by her supervisor, her employer can be held strictly liable, even if the employer was unaware of the harassment.¹⁴²

- The FEHA definition of "supervisor" is broader than under Title VII and includes anyone whom the employer gives authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances.¹⁴³
- An employer is not liable for a supervisor's harassment when it occurs outside the scope of employment.¹⁴⁴ However, the employer may be liable for harassment that takes place outside working hours if (a) it expressly or implicitly endorsed the conduct, and (b) the conduct was a customary incident of the employment relationship.¹⁴⁵

Examples:

- Employee's direct supervisor harassed her with inappropriate comments and unwanted touching. For example, the supervisor told the employee he would overlook her attendance problems if she would let him touch her vagina, then grabbed her crotch. Employer was strictly liable even though it did not find out about the supervisor's harassing behavior until it had been going on for two years.¹⁴⁶
- A supervisor made unwanted sexual advances, including physical groping, toward his employee in his car, at his home, and at informal social gatherings not sponsored by the employer. He also called her many times at her home and on her cell phone after business hours. The employer was not liable because the supervisor's sexual conduct was *outside the scope of his employment*.¹⁴⁷
- A casting director sexually harassed plaintiff, who was seeking employment as an actor, at the casting director's own home on a Sunday. Because the harassment occurred in the context of plaintiff's seeking employment, it was sufficiently work-related that the casting director's employer could be held liable.¹⁴⁸

Coworker Harassment: California law provides that when an employee is harassed by an employee who is not her supervisor, her employer can only be held liable if:¹⁴⁹

1. The employer knew (or should have known) of the harassing conduct, and
2. The employer failed to take immediate and corrective action.

Examples:

- In response to an employee's report that she was harassed by her coworker, the employer referred the complaint to a bogged-down investigative process, cautioned the employee to

protect herself, and told the coworker to leave the employee alone. This did not meet the requirement of immediate and corrective action, and the employer could be held liable.¹⁵⁰

- Employee complained to her employer about her coworker's harassment only after the harassing behavior had stopped. The employer promptly investigated the complaint. When the employer reported the findings to the employee, she said the situation had calmed down and made no further complaints. Because the employer took immediate and corrective action once it learned of the behavior, it was not liable.¹⁵¹

Harassment by a Non-Employee: The same standard may apply when an employee is harassed in the workplace by a non-employee, such as a client or customer, if the employer (1) knew or should have known of the harassment and (2) failed to take immediate corrective action.¹⁵²

Example:

- Employee worked as a nurse in a residential facility for disabled veterans. She was harassed by a resident, who made inappropriate remarks about her body and falsely told other residents that he'd had sex with her. After the employee reported the harassment to her supervisor, the resident received some counseling, but continued his behavior. The court held that the employer could be held liable for failing to take corrective action.¹⁵³

Statute of Limitations

A complaint under the FEHA must be filed with the Department of Fair Employment and Housing (DFEH) within one year of the last act of harassment.¹⁵⁴

2. FEHA: Retaliation (Cal. Gov't Code § 12940(h))

*It is unlawful for an employer to "harass, discharge, expel, or otherwise discriminate against any person because the person has opposed any [discriminatory or harassing] practices" forbidden by the FEHA, "or because the person has filed a complaint, testified, or assisted" in any FEHA proceedings.*¹⁵⁵

Elements of the Cause of Action for Retaliation:¹⁵⁶

The elements of the cause of action for retaliation are substantially similar to the elements for retaliation under Title VII:

1. The employee engaged in **protected activity**.
2. The employee was subjected to a **material adverse employment action** by her employer after engaging in the protected activity.
3. There was a **causal link** between the protected activity and the adverse employment action.
4. The employer is aware that the employee's complaint or opposition was based on a belief that the employer's conduct was discriminatory.¹⁵⁷

Protected activity: As under Title VII, FEHA protected activities fall into two main categories:

- Complaining of or opposing workplace conduct that the employee reasonably believes to be discriminatory, even if a court later determines the conduct complained of was lawful.¹⁵⁸
- Participating in any FEHA proceedings regarding workplace discrimination or harassment, even if it ultimately turns out that the conduct under investigation was lawful.¹⁵⁹

Material Adverse Employment Action: As is the case under federal law, California considers an adverse employment action to be one that substantially and materially affects the terms, conditions, or privileges of employment for the worse.¹⁶⁰

Examples:

- Employee refused to follow a male supervisor's order to fire a sales associate because he found her unattractive. Evidence suggested that the employer knew she opposed the order because she believed it was sex discrimination.¹⁶¹
- Employee's allegations of a months-long pattern of systemic retaliation by the employer, including solicitation of negative performance feedback from the employee's subordinates and implied threats of termination, constituted adverse employment action.¹⁶²
- Employee, a deputy district attorney, was transferred out of her unit after notifying her supervisors that she was pregnant. Subsequently, she received a negative performance review and counseling memo accusing her of dishonesty and incompetence. In her profession, this could reasonably prevent her from being promoted, so it constituted an adverse employment action.¹⁶³

Causal Link: A causal link can be inferred from circumstantial evidence. A causal link can be established by circumstances surrounding the adverse employment action and the protected activity, such as (a) employer's knowledge that employee engaged in protected activity, (b) proximity in time between the protected activity and the employment action,¹⁶⁴ or (c) a pattern of conduct consistent with an intent to retaliate, such as hostile or exclusionary treatment.¹⁶⁵

- A causal link likely does not exist if the adverse employment action is consistent with a policy or pattern adopted before the employee engaged in protected activity.¹⁶⁶

Example:

- Employee filed a discrimination claim with the EEOC in 1999, and was denied what should have been a routine promotion between 2002 and 2003. Even though several years had passed, a causal link could be inferred because in the interim, the employee was treated with coldness and was not invited to serve on management committees.¹⁶⁷

Exhaustion of Administrative Remedies/Statute of Limitations

A complaint under the FEHA must be filed with the Department of Fair Employment and Housing (DFEH) within one year of the last act of retaliation.¹⁶⁸ The DFEH will decide whether to issue a Right to Sue notice. You have one year from the date of your Right to Sue notice to file a lawsuit.¹⁶⁹

3. *Harassment in Business Relationships (Cal. Civ. Code § 51.9)*

In California, sexual harassment in the context of a "business, service, or professional relationship" is unlawful. This provision does not apply to traditional employment relationships, which are already covered by the FEHA.

Elements of the Cause of Action:¹⁷⁰

1. There is a **business, service, or professional relationship** between the plaintiff and defendant.
2. Defendant makes sexual advances, or engages in other sexual conduct, that are unwelcome and **pervasive or severe**.
3. Plaintiff **cannot easily terminate the relationship**.
4. Plaintiff has suffered or will suffer **harm**.

Business, service, or professional relationship: Examples of applicable relationships include, but are not limited to, the relationship between a plaintiff and her:¹⁷¹

- Physician, therapist, or dentist
- Attorney
- Social worker
- Banker
- Real estate agent
- Accountant
- Landlord
- Teacher

Pervasive or Severe: California courts apply the same meanings for “pervasive” and “severe” as under Title VII and the FEHA for workplace sexual harassment.¹⁷² Conduct is considered “pervasive or severe” when it significantly alters the conditions of the underlying business relationship.¹⁷³

- Isolated incidents are not necessarily pervasive or severe. A single instance of harassing behavior is usually not enough to qualify as “pervasive”; instead, there must be a repeated or routine pattern of harassment. However, a single incident may be “severe” if it consists of a physical assault or threat of physical assault.¹⁷⁴

Examples:

- Trustee of plaintiff’s husband’s estate made unwelcome sexual advances toward her, suggesting that he would vote to authorize a payment from the trust if she would be “nice” to him and saying that he would “get [her] on [her] knees eventually” and “f— [her] one way or another.” Trustee’s conduct was not sufficiently pervasive or severe because the advances were only made during a single day.¹⁷⁵
- Building manager entered the tenant’s home while on duty, using a key provided by the landlord, and sniffed underwear in the tenant’s dresser drawer. This was not “pervasive” enough to satisfy the statute because Tenant could only identify one occasion of the conduct.¹⁷⁶

Cannot easily terminate the relationship: The meaning of this language has not been directly interpreted by California courts. It may be that termination of a given relationship would require substantial cost in time or money. However, it is not required that termination would result in a tangible hardship.¹⁷⁷

Harm: Harm in this context may include: economic loss or disadvantage, personal injury, emotional distress, or violation of another statutory or constitutional right.¹⁷⁸

Statute of Limitations

Courts are divided as to whether the statute of limitations is two years (as for personal injury) or three years (as for liability created by statute).¹⁷⁹

4. *Ralph Act (Cal. Civ. Code § 51.7)*

California recognizes the right of all persons to be safe from violence or threats of violence committed against them because of certain characteristics, including sex, gender, marital status, pregnancy, and sexual orientation. The Ralph Act provides a civil remedy for such violent acts or threats.

The statutory language, in pertinent part, states the following:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property ... on account of any characteristic listed or defined [below] ... or because another person perceives them to have one or more of those characteristics.¹⁸⁰

"Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.¹⁸¹

Elements of the Cause of Action:¹⁸²

1. Defendant threatened or committed an *act of violence* against plaintiff.
2. Defendant was *motivated by his perception that plaintiff had a protected characteristic* (including gender, sex and sexual orientation).
3. Plaintiff was *harmed*.
4. Defendant's conduct was a *substantial factor* in causing the harm.

Act of Violence: Refers to a physical, destructive act.¹⁸³

Motivated by a perception that plaintiff had a protected characteristic: "Protected characteristics" under the Ralph Act include sex and gender.¹⁸⁴ Victim's sex or gender does not need to be the only, or even the main, reason for defendant's violent threats or actions.¹⁸⁵

Examples:

- Building manager forcibly grabbed plaintiff's breast and buttock as she pushed him away. These were violent acts under the Ralph Act.¹⁸⁶
- Coworker threatened violence against Employee, saying, "chick, you better walk faster or I am going to hurt you again," and kicked her on at least one occasion, causing her severe injury. Employee was the only woman in their group. The court concluded that Coworker's violent acts were motivated substantially by the employee's sex and national origin, even if there were other possible motivations.¹⁸⁷
- After an employee rejected her supervisor's verbal sexual advances, he became increasingly aggressive. One day the supervisor walked into the room where the employee was working and grabbed her. He squeezed and rubbed against her, placed his arm around her neck, and bit her. The supervisor's violent acts were determined to be motivated by his perception of her sex.¹⁸⁸

Statute of Limitations

An action under the Ralph Act must be filed within three years of the alleged conduct.¹⁸⁹

III. Sexual Assault and Other Sexual Misconduct

Sexual assault is any type of sexual activity or contact that you do not consent to. It includes physical acts, such as rape, sexual contact, or unwanted touching, and verbal, visual, or non-contact acts, such as voyeurism, exhibitionism, or forcing you to look at or pose for sexual pictures.

It is anything that forces a person to engage in sexual contact against their will or without their affirmative consent, no matter whom it is with. "Sexual assault [is not deemed] less serious just because the perpetrator and victim began the evening on a 'date.'"¹⁹⁰

A. Sexual Assault Under Federal Law: Civil Causes of Action

1. *Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)*

Title IX prohibits schools that receive federal funds from discriminating on the basis of sex.¹⁹¹ Sexual violence in the form of sexual assault or rape can constitute sexual harassment for purposes of Title IX.¹⁹²

Elements of the Cause of Action for Student-on-Student or Faculty-on-Student Sexual Assault:¹⁹³

1. The school exercised **substantial control** over both the perpetrator and the context in which the assault occurred.
2. The plaintiff suffered assault that was **severe, pervasive, and objectively offensive**.
3. The assault was committed on the basis of sex.
4. The school had **actual knowledge** of the harassment.
5. The school acted with **deliberate indifference** to the assault.
6. The school's deliberate indifference must have subjected the plaintiff to further assault. or made the plaintiff liable or vulnerable to it.

Substantial Control: A school exercises substantial control where the assault occurred during school hours or on school grounds, or where the perpetrator was under the school's disciplinary authority.¹⁹⁴

Example:

- Although instances of assault and harassment took place at a different school, a defendant high school was found to have had substantial control because it sponsored and promoted the football camp where the incidents took place and because its football coaches and teachers supervised the camp. Players were transported to the camp by the defendant school's buses, and the camp was governed by the camp's administrative and disciplinary procedures.¹⁹⁵

Severe, Pervasive, and Objectively Offensive: Conduct under Title IX must be so severe, pervasive, and objectively offensive that it deprives the plaintiff of access to educational opportunities or benefits provided by the school.¹⁹⁶

- A single occurrence of sexual assault may satisfy this requirement where “sufficiently serious” or particularly severe.¹⁹⁷
- To show deprivation of access, it is not necessary to show that a victim was physically excluded from educational opportunities or benefits. Sufficient examples may include demonstrating dropping grades, being diagnosed with behavioral and/or anxiety disorders, or becoming homebound or hospitalized due to harassment, physical violence, or sexual assault.¹⁹⁸

Examples:

- A football player was sexually assaulted with an air hose, he was hit with a pillow carrying a foreign object, and called homosexual epithets, among other forms of harassment, which amounted to sufficiently severe and pervasive conduct to bring a claim under Title IX.¹⁹⁹
- Repeated instances of harassment followed by an alleged rape were sufficient to state a claim under Title IX.²⁰⁰

Actual Knowledge: An institution can be held liable under Title IX only where it had actual knowledge of the harassment.²⁰¹ An appropriate school official, who had authority to take remedial measures, must have had knowledge of the harassment.²⁰² The official must respond to the misconduct “in a manner that is not clearly unreasonable.”²⁰³

Example:

- An institution’s awareness of a “general problem of sexual violence against its students,” combined with deficient corrective measures, was not sufficient to establish actual knowledge or deliberate indifference for a Title IX claim.²⁰⁴

Deliberate Indifference: Plaintiff must prove that the institution’s response amounted to deliberate indifference.²⁰⁵ A school district is deemed to act with deliberate indifference when, after notice of the sexual harassment, either its actions are grossly inadequate, or it does not take any action at all, and through its inadequate action or its lack of action, it effectively causes the student damage.²⁰⁶

- A plaintiff must show that the university’s response was deficient, rather than merely negligent, lazy, or careless.²⁰⁷
- The university’s deliberate indifference must have subjected the plaintiff to further assault or made the plaintiff liable or vulnerable to it.²⁰⁸ The plaintiff does not need to show additional affirmative acts of sexual assault happened after informing the institution of the initial incident.²⁰⁹ But, plaintiff must still “plead *something* regarding what happened after the school was put on notice.”²¹⁰

Examples:

- A school’s 9-month delay in convening a hearing on Title IX allegations was insufficient to show deliberate indifference.²¹¹
- The fact that a victim took it upon herself to avoid further harassment by not setting foot on campus did not absolve the institution of its responsibility to take reasonable measures.²¹²
- An alleged assault occurred on a university club’s weekend trip. A university’s 3-month delay prior to meeting with the alleged assailant was not sufficient to show deliberate indifference in the context of the university’s numerous communications with the club president.²¹³

Note: Courts often look to cases interpreting the Civil Rights Act statute, Section 1983, from which Title IX was based, in determining what constitutes “deliberate indifference” in specific cases.²¹⁴

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions.²¹⁵ In California, a person must file a Title IX claim within 2 years of a discriminatory act.²¹⁶

B. Sexual Assault Under Federal Law: Criminal Causes of Action

Federal sexual abuse statutes generally apply only in specific situations under federal control, such as in federal prisons or in maritime or territorial jurisdictions. Generally, state law is applicable to such crimes.

The federal crimes of sexual abuse (18 U.S.C. 2242), sexual abuse of a minor (18 U.S.C. 2243), and aggravated sexual abuse (18 U.S.C. 2241) all require different elements. Because they are not mutually exclusive, it is possible for a defendant to be convicted of all three crimes.

1. Sexual Abuse (18 U.S.C. § 2242)

Sexual abuse involves forced sexual activity.

Elements of a Cause of Action:²¹⁷

1. Defendant knowingly
2. Caused another person to engage in a sexual act by
 - a. Threatening the other person, OR
 - b. Placing the other person in fear (any type of fear besides fear of kidnapping, serious bodily injury, or death).²¹⁸

Elements of Sexual Abuse of an Incapable Victim:²¹⁹

1. The defendant ***knowingly***
2. Engaged in a sexual act with another person who is
 - a. ***Mentally incapable*** of understanding what is happening and cannot form the necessary consent, OR
 - b. ***Physically incapable*** of resisting the assault, i.e. cannot physically resist the sexual act or verbally articulate unwillingness to engage in the sexual act.

Knowingly: The 8th Circuit has held that the mens rea of “knowingly” extends to the victim’s incapacity or inability to consent.²²⁰

Mentally Incapable: Evidence of mental incapability includes “mental limitations, developmental delay, and lack of knowledge about sex.”²²¹

Physically Incapable: Victim does not have to be “physically helpless,” i.e. lack the physical ability to do anything.²²² Victim may have “had some awareness of the situation and – while not completely

physically helpless – was physically *hindered* due to sleep, intoxication, or drug use and thereby rendered physically incapable.²²³

Example:

- Victim had passed out after drinking with defendant and other young men. The next morning she woke up in her home with soreness in her vagina and anus. There was also blood in her underwear.²²⁴

Statute of Limitations

None.²²⁵

2. Sexual Abuse of a Minor (18 U.S.C. § 2243)

Elements of a Cause of Action:²²⁶

1. The defendant ***knowingly***
 - a. Note: It is not necessary to prove that the defendant knew the age of the other person or knew the requisite age difference existed.
2. Engaged in a sexual act
3. ***With a minor*** between the ages of ***12 and 16***, AND
4. An age difference of at least ***four years*** between the defendant and the minor

Example:

- Victim was 14 years old and defendant was 18 when the acts of sexual abuse occurred. The victim had fallen asleep next to defendant. She awoke to find that her pants and underwear had been removed and that defendant was on top of her, penetrating her vagina with his penis.²²⁷

Statute of Limitations

None.²²⁸

3. Aggravated Sexual Abuse (18 U.S.C. § 2241)

The violence or force element of aggravated sexual abuse distinguishes it from sexual abuse.²²⁹ Additionally, it is not necessary to provide evidence of the victim's lack of consent or resistance.²³⁰

Elements of Aggravated Sexual Abuse by Force or Threat:²³¹

The defendant caused another person to engage in a sexual act:²³²

1. By the use of force against that person OR
2. By threatening or placing that other person in fear that any person will be subjected to death, ***serious bodily injury***, or kidnapping.

Serious bodily injury: Bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.²³³

Examples:

- Defendant caused victim to engage in a sexual act by using a cucumber to penetrate her vagina. He used force in sexually abusing her, by holding her against the bed, with his knees on her shoulders, and by head-butting her on the nose.²³⁴
- The victim knew that the defendant was violent and that he would not hesitate to hurt her because she saw the abuse perpetrated against her brothers and dogs. These acts served as the major basis for her fear and belief that defendant would kill her, her brothers or mother if she told the police about their sexual relations.²³⁵

Elements of Aggravated Sexual Abuse by Other Means:²³⁶

The defendant engaged in a sexual act with another person by

1. Rendering that person *unconscious* OR
2. Administering to that other person *a drug, intoxicant, or similar substance*
 - a. By force or threat of force, or without that person's knowledge or permission and
 - b. Substantially impaired that person's ability to appraise or control conduct

Elements of Aggravated Sexual Abuse of Children:²³⁷

1. Defendant knowingly engaged in a sexual act
2. With a minor under 12 years old
 - a. Note: It is not necessary to prove that the defendant knew that the other person had not attained the age of 12 years²³⁸

OR

1. Defendant knowingly engaged in a sexual act
2. Under the circumstances described in "Aggravated Sexual Abuse by Force or Threat" and "Aggravated Sexual Abuse by Other Means" (*See above*)
3. With another person who is between the ages of 12 and 16 and at least 4 years younger than the defendant

Examples:

- Defendant was 13 years old when he began sexually abusing a 10-year old. The abuse continued for two years, until defendant was 15 and the victim was 12.²³⁹
- Defendant was 14 years old when he sexually abused a 5-year old victim by digitally penetrating her genital opening.

Statute of Limitations

None.²⁴⁰

4. *Abusive Sexual Contact (18 U.S.C. § 2244)*

*Sexual abuse (as described above) requires skin-to-skin contact, penetration or contact of genitalia.*²⁴¹ *Contrastingly, abusive sexual contact encompasses intentional touching of another (e.g., the genitalia, breast, or inner thigh) with the intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."*²⁴² *Abusive sexual contact may occur over or under clothing.*²⁴³

Elements of the Cause of Action:²⁴⁴

1. Defendant knowingly
2. Engaged in sexual contact with another person
3. Without that other person's permission

Statute of Limitations

None.²⁴⁵

Examples:

- An employee on a cruise ship (departing from and returning to an American port) fondled a 12-year-old girl while aboard the ship by touching her breasts and buttocks through her clothing.²⁴⁶
- While conducting bed checks, a house parent at a group home for children entered the bedroom of an 11-year-old girl and rubbed her genital area both over and under her underwear.²⁴⁷

5. Interstate Stalking (18 U.S.C. § 2261A)

Interstate stalking creates fear or emotional distress in victims or a victim's close relations, though it does not necessarily require direct contact with the victim(s).²⁴⁸

Elements of the Cause of Action:

1. Defendant travelled interstate
2. With the ***intent*** to kill, injure, harass, intimidate, or place under surveillance
3. And in the course of, or as a result of, such travel or communications engages in a ***course of conduct*** that
 - a. Places someone in reasonable fear of the death of, or ***serious bodily injury*** to (i) that person, (ii) that person's immediate family, (iii) that person's spouse or intimate partner OR
 - b. Causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to (i) that person, (ii) that person's immediate family, or (iii) that person's ***spouse or intimate partner***.

Course of conduct: A pattern of conduct composed of two or more acts, evidencing a continuity of purpose.²⁴⁹

Spouse or intimate partner:²⁵⁰ In addition to a spouse or former spouse of the stalking target, this may include:

- A person who shares a child in common with the target of the stalking
- A person who cohabits or has cohabitated as a spouse with the target of the stalking
- A person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by:
 - The length of the relationship
 - The type of the relationship, and
 - The frequency of interaction between the persons involved in the relationship

Examples:

- Intent was shown by: (1) Defendant stating an intention to kill or harm the victims on multiple occasions; (2) Defendant hacking into the victims' email accounts and collecting information; and (3) Defendant knocking on door to victims' apartment, with a notebook containing notes and lists that could be reasonably interpreted as a plan to kill the victims.²⁵¹
- Victims experienced a reasonable fear or substantial emotional distress as a result of defendant's interstate travel even though it was the police that informed the victims of defendant's actions. This is because it was reasonably foreseeable that the police, once informed of defendant's actions, would warn the victims and that the victims would experience reasonable fear or substantial emotional distress as a result.²⁵²
- Stalking through Interstate Travel: A defendant visited the school where he believed the victim was in attendance and delivered a note addressed to the victim's teacher, along with a picture of the victim and a pair of the victim's socks. The victim stated that she was afraid of being kidnapped or killed by defendant.²⁵³

Interstate stalking amounts to cyberstalking when a defendant uses e-mail or other forms of electronic communication.

Elements of a Cause of Action for Cyberstalking:²⁵⁴

1. Defendant used e-mail, Internet, or electronic communication service
2. With the intent to kill, injure, harass, intimidate, or place under surveillance
3. And in the course of, or as a result of, such travel or communications engages in a course of conduct that
 - a. Places someone in reasonable fear of the death of, or serious bodily injury to (i) that person, (ii) that person's immediate family, (iii) that person's spouse or intimate partner OR
 - b. Causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to (i) that person, (ii) that person's immediate family, (iii) that person's spouse or intimate partner.

Examples:

- Defendant who sent threatening and sexually explicit texts, emails, and photographs of a former girlfriend to her, her co-workers and friends was convicted of interstate stalking. He also used the Internet to create a Facebook page in a name close to her name to post suggestive and explicit photos of her and demeaning statements, purportedly made by her.²⁵⁵
- When defendant's girlfriend broke up with him after suffering a miscarriage, he sent her 22 threatening e-mails and 50 threatening text messages, which included photographs of dead and dismembered women as well as a photograph of a dead infant. He was convicted for cyberstalking.²⁵⁶

Statute of Limitations

Five years.²⁵⁷

6. Interstate Domestic Violence (18 U.S.C. § 2261)

Interstate domestic violence encompasses violence committed against a spouse, intimate partner, or dating partner incidental to interstate travel.

Elements of Interstate Domestic Violence via Travel or Conduct of Offender:²⁵⁸

1. Defendant travelled interstate
2. With the intent to kill, injure, harass, or intimidate
3. A *spouse, intimate partner, or dating partner*, and
4. In the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against
5. That spouse, intimate partner, or dating partner

Spouse, Intimate Partner, or Dating Partner:²⁵⁹ In addition to a spouse or former spouse of the abuser, this may include:

- A person who shares a child in common with the abuser
- A person who cohabits or has cohabited as a spouse with the abuser
- A person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by:
 - The length of the relationship
 - The type of relationship, and
 - The frequency of interaction between the persons involved in the relationship

Elements of Interstate Domestic Violence via Causing Travel of Victim:²⁶⁰

1. Defendant caused a spouse, intimate partner, or dating partner
2. To travel interstate
3. By force, *coercion*, duress, or fraud, and
 - a. Victim did not consent to the interstate travel²⁶¹
 - b. Coercion or duress exists when an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there is no reasonable opportunity to escape²⁶²
4. In the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against
5. That spouse, intimate partner, or dating partner

Coercion: Does not require that the defendant maintain constant physical control or oversight of his victim.²⁶³ Whether victim is subject to coercion or duress or has reasonable opportunity to escape must be evaluated from perspective of reasonable person in victim's position, considering all of circumstances, including victim's gender.²⁶⁴

Examples:

- Coercion and duress were found where, even though the victim was sometimes free from defendant's supervision and was able to talk with others who could have provided help, there was no reasonable opportunity for her to escape from her abuser. She was intimidated from years of physical, sexual, and psychological abuse, and also feared being implicated in harboring a fugitive.²⁶⁵
- Defendant subjected the victim, a woman he was romantically involved with, to numerous instances of physical and psychological abuse, e.g. beating and raping her, and threatening to kill her and her family, as they traveled through Montana, Colorado, and Utah.²⁶⁶

Statute of Limitations

Five years.²⁶⁷

7. *Interstate Violation of a Protective Order (18 U.S.C. § 2262)*

Violation of a protective order may occur when a defendant travels across state lines or when a defendant forces another person to do so.

Elements of Interstate Violation of a Protective Order: Travel or Conduct of Offender:²⁶⁸

1. Defendant travelled interstate
2. With the intent to engage in conduct that
3. Violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person
4. Subsequently engages in such conduct

Elements of Interstate Violation of a Protective Order: Causing Travel of Victim:²⁶⁹

1. Defendant caused another person to travel interstate
2. By force, coercion, duress, or fraud, and
3. In the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person

Example:

- Defendant crossed a state line with the intent to violate a protection order and subsequently violated that order. His visit to victim's school constituted an attempt to contact and send messages to the victim and her family, which the protection order prohibited. Further, the school defendant visited was a place of work for the victim's mother, thus his visit also violated the protection order's command that he stay away from the mother's place of work.²⁷⁰

Statute of Limitations

Five years.²⁷¹

B. *Sexual Assault Under California Law: Civil Causes of Action*

1. *Sexual Battery (Cal. Civ. Code § 1708.5)*

Elements of a Cause of Action:

1. Defendant acts with the intent to cause (1) a harmful or offensive contact with the ***intimate part*** of another, (2) contact with another by use of his or her intimate part, or (3) imminent apprehension of such conduct.
2. A ***sexually offensive contact*** with that person directly or indirectly results.²⁷²
3. Batteree did not consent to the contact.²⁷³

Intimate part: The sexual organ, anus, groin, or buttocks of any person, or the breast of a female.²⁷⁴

Sexually Offensive Contact: Contact that offends a reasonable sense of personal dignity.²⁷⁵

Examples:

- Defendant went to victim's apartment to repair a water leak in her shower, when he thereafter called her into the bathroom, and proceeded to put his arm around her. Victim pushed him away, and he grabbed her breast, and, after being pushed away again, grabbed her buttock as she walked away from him. Such acts, if proven, would constitute sexual battery.²⁷⁶
- Husband and wife brought action against church and pastor on sexual battery, arising out of wife's sexual relationship with pastor. Evidence wife resisted the pastor's advances or, at times, told him to stop, was accompanied by her statements that she was afraid they would be caught, not that she found his advances offensive or unwelcome. Therefore, non-consent of the wife was not found.²⁷⁷
- Defendant grabbed plaintiff from behind, kissed her neck, and pursued her when she tried to escape. Though defendant did not touch any of plaintiff's "intimate parts," he caused her to feel imminent apprehension that he would. This constituted sexual battery.²⁷⁸

Employer liability

An employer is liable for the sexual misconduct of an employee only where the misconduct occurred in the scope of the perpetrator's employment.²⁷⁹

Example:

- An ultrasound technician sexually assaulted a patient while conducting an ultrasound exam at a hospital. Patient sued the technician and the hospital which contracted with the technician's employer for provision of ultrasound services. The court held the hospital was not liable under doctrine of respondeat superior for the technician's sexual assault because the sexual battery was not "foreseeable from the employee's duties." Although the assault would not have occurred but for the employment by the hospital, it was not "engendered by the employment" or motivated by "work events or conditions."²⁸⁰

Statute of Limitations²⁸¹

1. Two years;
2. If the conduct is committed when the plaintiff was a minor, within eight years after the plaintiff reaches the age of majority or within three years after the date of reaching the age of majority that the plaintiff reasonably should have discovered the psychological injury caused by the sexual misconduct, whichever is later.

2. Gender Violence (Cal. Civ. Code § 52.4)

Gender violence is a form of sex discrimination and consists of any gender-motivated hate conduct, sexual assault/battery or other conduct at least based in part on gender.

Elements of a Cause of Action:

1. Gender-motivated hate conduct:²⁸² One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another;
2. Committed at least in part based on the gender of the victim, whether or not those acts would have resulted in criminal charges, prosecution, or conviction.

Comparison with Other California laws

Given the abundance of other civil liability statutes covering the same or similar misconduct, the need for § 52.4 may not be readily apparent. Distinguishing features include:

1. Longer statute of limitations than a Ralph Act claim for plaintiffs victimized as minors.²⁸³
2. Longer statute of limitations for non-minors than a claim for sexual battery under Cal. Civ. Code § 1708.5,²⁸⁴ in addition to the availability of attorney's fees for a prevailing plaintiff.²⁸⁵
3. Prohibits some misconduct that the sexual harassment in Civ. Code § 51.9 and the torts of domestic violence and stalking do not, such as a sexual assault not arising out of a business or intimate partner relationship.²⁸⁶

Statute of Limitations²⁸⁷

1. Three years;
2. If the victim was a minor at the time of the alleged misconduct: eight years after the plaintiff reaches majority or within three years of the plaintiff discovering (or of when the plaintiff should have reasonably discovered) the psychological injury or illness occurring after the age of majority—whichever date occurs later.

3. Stalking (Cal. Civ. Code § 1708.7)

Stalking encompasses willfully, maliciously, and repeatedly following or harassing another, as well as making credible threats with intent to place another in reasonable fear for his or her own safety or the safety of his or her immediate family.

Elements of the Cause of Action:

1. Person engaged in a ***pattern of conduct*** intended to follow, alarm, surveil, or harass;
2. As a result of the pattern of conduct:
 - a. The plaintiff reasonably *feared for their safety* or the safety of an immediate family member; OR
 - b. The plaintiff suffered ***substantial emotional distress***.
3. The person made a ***credible threat*** with either the intent to place plaintiff in reasonable fear for their safety (or safety of immediate family member) or with reckless disregard for the safety of the plaintiff (or the safety of immediate family member), OR defendant *violated a restraining order*.

Pattern of Conduct: Conduct composed of a series of acts over a period of time, *however short*, evidencing a *continuity* of purpose.

Substantial Emotional Distress: “Substantial emotional distress” does not equal “severe emotional distress,”²⁸⁸ and does not require a showing of physical manifestations of emotional distress.²⁸⁹ “[I]t requires the evaluation of the totality of the circumstances to determine whether the defendant reasonably caused the plaintiff substantial fear, anxiety, or emotional torment.”²⁹⁰

Credible Threat: Verbal or written threat or a threat implied by a pattern of conduct made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.²⁹¹

Note: There have been very few cases decided under § 1708.7. Because the tort of stalking set forth in § 1708.7 is very similar to the crime of stalking set forth in Penal Code § 646.9, the case law under § 646.9 should be consulted. (See more below under § 646.9)

Cyberstalking occurs when a defendant uses e-mail or other forms of electronic communication.

Elements of the Cause of Action:

1. Person engaged in a ***pattern of conduct*** intended to follow, alarm, surveil, or harass;
2. As a result of the pattern of conduct:
 - a. The plaintiff reasonably *feared for their safety* or the safety of an immediate family member; OR
 - b. The plaintiff suffered ***substantial emotional distress***.
3. The person made a ***credible threat*** with either the intent to place plaintiff in reasonable fear for their safety (or safety of immediate family member) or with reckless disregard for the safety of the plaintiff (or the safety of immediate family member), OR defendant *violated a restraining order*.

Credible Threat: Threat communicated via electronic communication, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.²⁹²

Statute of Limitations

Two years.²⁹³

C. Sexual Assault Under California Law: Criminal Causes of Action

1. Assault with Intent to Rape (Cal. Penal Code § 220)

For attempted rape, the focus shifts from the element of penetration to the requisite intent. Unlike the completed crime of rape, it is the state of mind of the defendant, not the victim, that is at issue.

Elements of a Cause of Action:²⁹⁴

1. Defendant assaults another
2. With intent to commit mayhem, rape, sodomy, oral copulation, or any lewd or lascivious acts.

Defendant's state of mind can be inferred from his conduct and the surrounding circumstances.²⁹⁵

Examples:

- Defendant used force to induce victim to submit to attempted sexual acts. The victim resisted and managed to escape. Defendant claimed that he was intoxicated and was incapable of rape. Court upheld conviction. Inability to commit rape because of intoxication is not a defense to the crime of assault with intent to commit rape.²⁹⁶ Also force does not require bodily harm, but the physical power under the circumstances to overcome another's resistance.²⁹⁷
- Defendant broke into a hotel window at night and had sex with the victim. Defendant argued that he did not use force. There was evidence that defendant forcibly entered victim's bedroom, removed victim's underwear, and stuck his finger in her vagina while she was asleep; "the offense is complete if at any moment during the assault the accused intends to use

whatever force may be required.”²⁹⁸ Unlawful use of force includes any harmful or offensive touching.²⁹⁹

- Defendant pulled a 14-year-old girl into his house, held her down on the floor, pulled up her shirt and bra and unsnapped and unzipped her pants, despite her attempts to prevent him from doing so. Defendant claimed that at some time, he abandoned intent to have forcible sexual intercourse with the girl. Regardless, the court held that if at any point during the incident, defendant entertains the intent to have sexual intercourse with his victim by force, the crime of assault with intent to commit rape is complete.³⁰⁰
- Defendant pushed victim into a bedroom and on to the bed. Victim kicked and struggled. Defendant released her only when she claimed that someone was coming. “The absence of an immediate outcry” does not conclusively bar a finding of assault with intent to commit rape.³⁰¹

Statute of Limitations³⁰²

1. Where the victim is 18 years of age or older, the statute of limitations is three years.³⁰³
2. When the victim is under 18, the statute of limitations is six years.³⁰⁴
3. When the assault with intent to rape occurs in the commission of a burglary of the first degree, there is no statute of limitations.³⁰⁵

2. Rape (Cal. Penal Code §§ 261-262)

An act of sexual intercourse, or penetration done against a person's will through "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" on that person or another person.

Elements of a Cause of Action

1. Act of ***sexual intercourse***;
2. The victim did not consent to the intercourse;
3. Under any of these circumstances:
 - a. ***Incapacity*** to give consent;
 - b. Accomplished by ***use of force***, violence, duress, menace, fear, or threat (including threat to retaliate in the future or to use authority to incarcerate, arrest or deport someone);
 - c. Where a person is intoxicated;
 - d. Where a person is unconscious, asleep, or unaware that the act occurred due to the perpetrator's fraudulent representations.

Sexual intercourse: Any penetration, no matter how slight.³⁰⁶

Consent: To consent, a person must act freely and voluntarily and know the nature of the act.³⁰⁷

Evidence that the defendant and the victim dated, were currently married, or had been married is not by itself enough to constitute consent.³⁰⁸

Withdrawal of Consent: A person who initially consents to an act of intercourse may change his or her mind during the act and withdraw consent by communicating an objection through words or acts that a reasonable person would understand as showing a lack of consent.³⁰⁹

- Clear withdrawal of consent nullifies any earlier consent and forcible persistence in what then becomes nonconsensual intercourse constitutes rape. It is immaterial at what point the victim

withdraws consent, so long as that withdrawal is communicated to the perpetrator and he or she ignores it.³¹⁰

- A withdrawal of consent is assumed after a defendant expressly or impliedly threatens the victim; the victim need not expressly withdraw consent at that point.³¹¹

Examples:

- Victim first impliedly consented to have sex with the defendant. Later she resisted and expressed that she did not want intercourse. Defendant was found guilty of rape.³¹²
- Sex workers agreed to have sex with the defendant. Defendant then communicated the express or implied threat that, if victims did not continue to cooperate after he produced the knife and held it to their throats, he would do them harm. Each victim's continued participation in the sexual encounter was nonconsensual after that point.³¹³

Incapacity: A person is incapacitated where a mental disorder or developmental or physical disability renders them incapable of giving consent.³¹⁴ No expert testimony is required to prove incapacity.³¹⁵ It is required that a defendant either knew or should have known that the victim was so mentally impaired so as to be incapable of giving legal consent.³¹⁶

Example:

- A group home for the developmentally disabled hired defendant to help care for its residents, including the victim. Defendant sexually violated the victim, who was developmentally disabled and thus not capable of giving legal consent.³¹⁷

Use of Force:³¹⁸ Establishing use of force requires showing “the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will” of the victim.³¹⁹ “Force” in a forcible rape prosecution does not have a substantially different meaning from or require anything substantially greater than “the physical force normally inherent in an act of consensual sexual intercourse.”³²⁰

Example:

- Defendant pinned the victim’s arms to the floor and penetrated her against her will. This was sufficient to support the jury’s determination that this constituted force.³²¹

Statute of Limitations

None, for crimes committed on or after January 1, 2017, or crimes for which the statute of limitations had not run as of January 1, 2017.³²²

3. Statutory Rape (Cal. Penal Code § 261.5)

Sexual intercourse with a person under 18 years of age who is not the spouse of the perpetrator.

Elements of the Cause of Action:

1. Act of sexual intercourse;
2. Accomplished with a person not the spouse of the perpetrator;
3. Person is a minor (under the age of 18);

Note: Two minors who engage in sexual intercourse with each other can both be punished under the statute.

Example:

- Defendant had sexual intercourse with a 15-year-old. The court held that neither a lack of consent, nor the use of force, nor a showing of resistance on the part of the victim are necessary elements of for a finding of statutory rape.³²³

Statute of Limitations³²⁴

1. If the minor is no more than three years older or younger than the perpetrator, the perpetrator is guilty of a misdemeanor. The statute of limitations is one year.
2. Otherwise, the statute of limitations is three years.

4. *Stalking (Cal. Penal Code § 646.9)*

Stalking encompasses willfully, maliciously, and repeatedly following or harassing another, as well as making credible threats with intent to place another in reasonable fear for his or her own safety or the safety of his or her immediate family. See also: Cal. Civ. Code § 1708.7 (above).

Elements of a Cause of Action:

1. Willful, malicious, and repeated following or willful and malicious **harassment** of another person
2. **Credible threat** made with **intent** to place that person in **reasonable fear for their safety** or safety of an immediate family member

Harassment: Knowing and willful behavior that “seriously alarms, annoys, torments, or terrorizes” another person and serves no legitimate purpose.³²⁵

Credible Threat: Threat that is verbal, written, communicated electronically or implied by a pattern of conduct, made with intent to place another person in reasonable fear for his or her safety or the safety of his or her family.³²⁶

- While the threat must be made with the apparent ability to carry out the threat, it is not necessary to prove defendant’s intent to carry out the threat.

Examples:

- Defendant wrote letters that discussed his “obsessive desire” to spend eternity with the victim, his wish to engage in sexual acts with her, and his skill with a rifle. He included pornography and threats to commit violence. It was inferred that defendant credibly intended to cause the victim to fear him, because he insisted on maintaining contact with the victim despite her attempts to avoid him and warnings from the police, the court, and the victim’s husband.³²⁷
- Defendant was charged for stalking, after damaging telephone line, trespass, disturbing the peace, and making annoying telephone calls. Defendant contended the stalking conviction could not stand because the evidence was insufficient to show repeated harassment, as all the actions occurred within the space of a few hours on a single evening. Court held that the words “willfully, maliciously and repeatedly” only modify “following.” The statute does *not require that harassment be repeated.*³²⁸

- While the victim was away from his residence, the defendant broke into the victim's place several times with a plan to rape the victim. When victim learned of these things later, he became concerned about the safety of himself and his family. For the defendant to violate the statute prohibiting stalking, the victim's fear need not be contemporaneous with defendant's threats and harassment.³²⁹
- The accused was obsessed with the victim for 12 years. He was previously arrested and ordered to stay away from the victim. He kept calling the victim and sent her letters.³³⁰

Cyberstalking³³¹ is a technology-based version of stalking. It may include "threatening, obscene, or hateful" emails, faxes, or voice mail messages.³³² Cyberstalking can lead to offline incidents of violent crime.³³³

Elements of a Cause of Action:³³⁴

1. The use of the Internet, e-mail or other telecommunication technologies (including, but not limited to, computers, fax machines, and cellular telephones³³⁵)
2. To make a credible threat with intent to place that person in reasonable fear for their safety or safety of an immediate family member

Examples:

- Defendant's conduct, which included sending "multiple messages on Facebook," was found to constitute a credible threat.³³⁶

Statute of Limitations

The crime of stalking is punishable by imprisonment in county jail, a fine, or imprisonment in state prison.³³⁷ Actions must be commenced within one year if punishable by fine or county jail³³⁸ and within three years if punishable by imprisonment in state prison.³³⁹

5. Indecent Exposure (Cal. Penal Code § 314)

Willful exposure of one's private parts to another person, for the purpose of either gratifying oneself or offending the other person.

Elements of Cause of Action:³⁴⁰

1. Willful and lewd **exposition** of one's person, or private parts thereof;
2. In any public place or place where there are present other persons to be offended or annoyed thereby; OR
3. Procuring, counseling, or assisting any person so to expose him- or herself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts.

Exposition: There are three types of "sexually motivated" exposure. A person may be convicted for exposing himself for (1) his own sexual gratification, (2) sexual gratification of the viewer, or (3) offending the viewer in a sexual way.³⁴¹

- Indecent exposure does not require that the "victim" be harmed or bothered by the conduct. The offender's motivation must have been "sexual" in a way he or she should have known could be offensive.³⁴²

Note: The first conviction of indecent exposure is a misdemeanor while subsequent offenses are felonies punishable by a maximum of three years' imprisonment.

Example:

- A man sunbathed in the nude on isolated beach. A conviction of indecent exposure would require proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.³⁴³

Statute of Limitations:³⁴⁴

1. One year for misdemeanors
2. Three years for felonies.³⁴⁵

6. Hate Crimes (Cal. Penal Code § 422.6)

Crimes committed to interfere with a person's civil liberties or to intimidate.

Elements of the Cause of Action:³⁴⁶

1. (a) To willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege; OR
(b) To deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege
2. In whole or in part because of their actual or perceived gender (or because of any of the following: disability, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics).

Statute of Limitations

One year.³⁴⁷

7. Revenge Porn (Cal. Penal Code § 647(j)(4))

The intentional distribution of sexual images that were expected to be kept private, of another person with the intent to cause him or her emotional distress.

Elements of the Cause of Action:³⁴⁸

1. **Intentional distribution** of an image of
 - a. the **intimate body part**(s) of another identifiable person; OR
 - b. the person depicted engaged in a sexual act (including masturbation);
2. Where the parties agreed or understood that the image was to remain private;
3. The person distributing the image knew or should have known that distribution of the image would cause **serious emotional distress**;
4. The person depicted suffers this emotional distress.

Intentional Distribution: A person intentionally distributes an image when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.³⁴⁹

Intimate body part: Any portion of the genitals, the anus, or the breasts below the top of the areola (for females only), that is either uncovered or clearly visible through clothing.³⁵⁰

Serious Emotional Distress: In this context, serious emotional distress is not intended to have a technical legal definition, but rather is to be understood based on common use and common knowledge.³⁵¹

Example:

- Defendant was convicted where he posted a picture of his ex-girlfriend’s bare breasts on her company’s Facebook page. It was understood between the two of them that the photo was meant to be private. The Court clarified even if a specialized legal definition of “serious emotional distress” were used, the victim’s state of mind would qualify: victim testified that she was embarrassed, worried about losing her job, believed she needed psychological help, and told her mother that she wanted to “get in the car and go kill [herself].”³⁵²

Statute of Limitations

One year.^{353 354}

¹ 42 U.S.C. § 2000e, et seq.

² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

³ *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354 (2000); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

⁴ *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

⁵ See *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002).

⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The touchstone is business necessity”).

⁷ *Id.* at 430.

⁸ *Ernst v. City of Chicago*, 837 F.3d 788, 805 (7th Cir. 2016).

⁹ *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002).

¹⁰ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); see 42 U.S.C. § 2000-e-5(f)(1).

¹¹ 42 U.S.C. § 2000e-5(e)(1).

¹² 20 U.S.C. § 1681(a).

¹³ 20 U.S.C. § 1681(c).

¹⁴ U.S. Dep’t of Educ., Office for Civil Rights, Q&A on Campus Sexual Misconduct (2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

¹⁵ 20 U.S.C. § 1681(a).

¹⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005).

¹⁷ *Id.*

¹⁸ *Id.* at 180-81.

¹⁹ *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 858-59 (9th Cir. 2014).

²⁰ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135-36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California’s personal injury statute of limitations).

²¹ See 29 U.S.C. § 206(d)(1).

²² *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983).

²³ *Gunther v. County of Wash.*, 623 F.2d 1303, 1309-10 (9th Cir. 1989).

²⁴ *Id.*

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- ²⁵ *Rizo v. Yovino*, 887 F.3d 453, 456-57 (9th Cir. 2018).
- ²⁶ 29 U.S.C. § 255(a).
- ²⁷ *McLaughlin v. Richland Show Co.*, 486 U.S. 128, 133 (1988).
- ²⁸ *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1240 (2014).
- ²⁹ See *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 307 (2010).
- ³⁰ *Dinslage v. City & County of San Francisco*, 5 Cal. App. 5th 368, 378 (2016).
- ³¹ See *Lelaind v. City & County of San Francisco*, 576 F. Supp. 2d 1079, 1095-99 (N.D. Cal. 2008).
- ³² *City and County of San Francisco v. Fair Employment and Hous. Comm'n*, 191 Cal. App. 3d 976, 989-90 (1987).
- ³³ California Civil Jury Instructions (CACI) 2502. Disparate Impact – Essential Factual Elements (Cal. Gov't Code § 12940(a)).
- ³⁴ See *Terry v. City of San Diego*, 380 Fed. Appx. 591, 592-93 (9th Cir. 2010).
- ³⁵ *Id.* at 593.
- ³⁶ Cal. Labor Code § 1197.5(a).
- ³⁷ *Id.*
- ³⁸ *Green v. Par Pools Inc.*, 111 Cal. App. 4th 620, 629 (2003).
- ³⁹ *Id.* at 632.
- ⁴⁰ Cal. Labor Code § 1197.5(i).
- ⁴¹ Cal. Civ. Code § 51(b).
- ⁴² See CACI 3060 (Unruh Civil Rights Act – Essential Factual Elements).
- ⁴³ *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007).
- ⁴⁴ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 35-36 (1985).
- ⁴⁵ *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 168 (2007).
- ⁴⁶ *Id.* at 175.
- ⁴⁷ *Semler v. Gen. Elec. Capital Corp.*, 196 Cal. App. 4th 1380, 1387 (2011); compare Cal. Civ. Proc. Code § 335.1 with Cal. Civ. Proc. Code § 338(a).
- ⁴⁸ 29 C.F.R. § 1604.11(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).
- ⁴⁹ 2 Cal. C. Regs. § 11019(b)(2).
- ⁵⁰ 42 U.S.C. § 2000e-2(a).
- ⁵¹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (“[I]n 1980 the EEOC issued Guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII... Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).
- ⁵² 29 C.F.R. § 1604.11.
- ⁵³ 42 U.S.C. § 2000e(b).
- ⁵⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).
- ⁵⁵ *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982).
- ⁵⁶ *Id.* at 904.
- ⁵⁷ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).
- ⁵⁸ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986).
- ⁵⁹ *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005).
- ⁶⁰ *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010).
- ⁶¹ *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000).
- ⁶² *Gorski v. New Hampshire Dep't of Corr.*, 290 F.3d 466, 472 (1st Cir. 2002).
- ⁶³ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).
- ⁶⁴ See *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 443 (1st Cir. 1997).
- ⁶⁵ See *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010).
- ⁶⁶ *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).
- ⁶⁷ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).
- ⁶⁸ See generally *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000).
- ⁶⁹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

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- ⁷⁰ *Id.* at 23.
- ⁷¹ *Id.* at 21-22.
- ⁷² *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62 (1986).
- ⁷³ *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).
- ⁷⁴ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998) (finding that when a plaintiff can demonstrate that “a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII”).
- ⁷⁵ *Id.* at 745.
- ⁷⁶ *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 689 (9th Cir. 2017).
- ⁷⁷ See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).
- ⁷⁸ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60, 67 (1986).
- ⁷⁹ See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001).
- ⁸⁰ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); 42 U.S.C. § 2000-e-5(f)(1).
- ⁸¹ 42 U.S.C. § 2000e-5(e)(1); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Martin v. Nevada Employment Sec. Div.*, 99 F. App’x 832, 833 (9th Cir. 2004).
- ⁸² *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); see 42 U.S.C. § 2000-e-5(f)(1).
- ⁸³ 42 U.S.C. § 2000e-3(a) (section 704(a) of Title VII).
- ⁸⁴ *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002).
- ⁸⁵ 42 U.S.C. § 2000e-3(a) (section 704(a) of Title VII).
- ⁸⁶ *Id.*
- ⁸⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).
- ⁸⁸ *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).
- ⁸⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
- ⁹⁰ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006).
- ⁹¹ See *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002).
- ⁹² 42 U.S.C. § 2000e-5(e)(1); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Martin v. Nevada Employment Sec. Div.*, 99 F. App’x 832, 833 (9th Cir. 2004).
- ⁹³ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); see 42 U.S.C. § 2000-e-5(f)(1).
- ⁹⁴ See, e.g. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639 (1999).
- ⁹⁵ *Id.* at 651.
- ⁹⁶ *Id.* at 644-45.
- ⁹⁷ *Id.* at 646.
- ⁹⁸ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009).
- ⁹⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ¹⁰⁰ *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).
- ¹⁰¹ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1028 (E.D. Cal. 2009).
- ¹⁰² *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ¹⁰³ *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013).
- ¹⁰⁴ *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).
- ¹⁰⁵ *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *10 (N.D. Cal. Dec. 11, 2015).
- ¹⁰⁶ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).
- ¹⁰⁷ *Hunter ex rel. Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 265 (D. Mass. 2006); see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999).
- ¹⁰⁸ *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006).
- ¹⁰⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649 (1999).
- ¹¹⁰ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998).
- ¹¹¹ See *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1038 (E.D. Cal. 2009).
- ¹¹² See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998) (noting that considerations “comparable” to those underlying Title IX violations “led to our adoption of a deliberate indifference standard for claims under §

1983 ..."); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992) (looking to Section 1983 in holding that private plaintiffs could seek monetary damages against a school under Title IX for intentional discrimination); *Doe v. Willits Unified Sch. Dist.*, 473 F. App'x 775, 776 (9th Cir. 2012) (relying on Section 1983 case law in discussing the deliberate indifference standard under Title IX).

¹¹³ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135-36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California's personal injury statute of limitations).

¹¹⁴ Cal. Civ. Proc. Code § 335.1.

¹¹⁵ Cal. Gov't Code § 12940(j)(1).

¹¹⁶ *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1240 (2014); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1172 (9th Cir. 2001) ("California's intermediate appellate courts have adopted the federal definition of both types of harassment [hostile work environment and quid pro quo].").

¹¹⁷ Cal. Gov't Code § 12940(j), (h).

¹¹⁸ *Hirst v. City of Oceanside*, 236 Cal. App. 4th 774, 791 (2015).

¹¹⁹ *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409, 1418 (1993).

¹²⁰ California Civil Jury Instructions (CACI) 2521a. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)).

¹²¹ *See, e.g., Hirst v. City of Oceanside*, 236 Cal. App. 4th 774, 778 (2015); *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 348 (1993).

¹²² *See, e.g., Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

¹²³ *See* California Civil Jury Instructions (CACI) 2521a. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)).

¹²⁴ *See, e.g., Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 295 (2006) ("FEHA is 'not a civility code' and is not designed to rid the workplace of vulgarity.").

¹²⁵ *See, e.g., Singleton v. U.S. Gypsum Co.*, 140 Cal. App. 4th 1547, 1562 (2006).

¹²⁶ *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 130 (1999).

¹²⁷ *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

¹²⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

¹²⁹ *See generally Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000).

¹³⁰ *Id.* at 1114.

¹³¹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).; California Civil Jury Instructions (CACI) 2524. "Hostile Work Environment" Explained.

¹³² *See* California Civil Jury Instructions (CACI) 2521a. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code § 12940(j)).

¹³³ *Miller v. Dep't of Corr.*, 36 Cal. 4th 446, 451 (2005).

¹³⁴ *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 614 (1989).

¹³⁵ *McCoy v. Pac. Mar. Ass'n*, 216 Cal. App. 4th 283, 293-94 (2013).

¹³⁶ *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 516-17 (1998); California Civil Jury Instructions (CACI) 2520. Quid pro quo Sexual Harassment - Essential Factual Elements.

¹³⁷ *Bihun v. AT&T Info. Sys., Inc.*, 13 Cal. App. 4th 976, 987 (1993), disapproved on other grounds by *Lakin v. Watkins Assoc. Indus.*, 6 Cal. 4th 644, 664 (1993).

¹³⁸ Cal. Gov't Code § 12940(j)(4)(A).

¹³⁹ Cal. Gov't Code § 12940(k).

¹⁴⁰ *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1044 (2003).

¹⁴¹ *Id.* at 1042-43.

¹⁴² *Id.* at 1042.

¹⁴³ Cal. Gov't Code § 12926(t).

¹⁴⁴ *See Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403, 1422-23 (2007).

¹⁴⁵ *Capitol City Foods, Inc. v. Superior Court*, 5 Cal. App. 4th 1042, 1049 (1992).

¹⁴⁶ *Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1041-42 (2003).

¹⁴⁷ *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403, 1428-29 (2007).

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- ¹⁴⁸ *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1052 (1996).
- ¹⁴⁹ Cal. Gov't Code § 12940(j)(1).
- ¹⁵⁰ *Bradley v. Cal. Dep't of Corr. & Rehab.*, 158 Cal. App. 4th 1612, 1630-34 (2008).
- ¹⁵¹ *Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1184-85 (2004).
- ¹⁵² Cal. Gov't Code § 12940(j)(1).
- ¹⁵³ *Carter v. Cal. Dep't of Veterans Affairs*, 38 Cal. 4th 914, 919 (2006).
- ¹⁵⁴ Cal. Gov't Code § 12960(d).
- ¹⁵⁵ Cal. Gov't Code § 12940(h).
- ¹⁵⁶ See California Civil Jury Instructions (CACI) 2505 Retaliation – Essential Factual Elements (Cal. Gov't Code § 12940(h)).
- ¹⁵⁷ *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1046-47 (2005).
- ¹⁵⁸ *Id.* at 1043.
- ¹⁵⁹ Cal. Gov't Code § 12940(h).
- ¹⁶⁰ See California Civil Jury Instructions (CACI) 2059 "Adverse Employment Action" Explained.
- ¹⁶¹ *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042-48 (2005).
- ¹⁶² *Id.* at 1049-51.
- ¹⁶³ *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1456 (2002).
- ¹⁶⁴ *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 615 (1989).
- ¹⁶⁵ *Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 421 (2007).
- ¹⁶⁶ *McCaskey v. Cal. State Auto. Ass'n*, 189 Cal. App. 4th 947, 989 (2010).
- ¹⁶⁷ *Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 421 (2007).
- ¹⁶⁸ Cal. Gov't Code § 12960(d).
- ¹⁶⁹ Cal. Gov't Code § 12965(b).
- ¹⁷⁰ See California Civil Jury Instructions (CACI) 3065. Sexual Harassment in Defined Relationship – Essential Factual Elements (Civ. Code § 51.9).
- ¹⁷¹ Cal. Civ. Code § 51.9.
- ¹⁷² *Hughes v. Pair*, 46 Cal. 4th 1035, 1038 (2009).
- ¹⁷³ *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).
- ¹⁷⁴ *Hughes v. Pair*, 46 Cal. 4th 1035, 1043 (2009).
- ¹⁷⁵ *Id.* at 1048.
- ¹⁷⁶ *Ramirez v. Wong*, 188 Cal. App. 4th 1480, 1487 (2010).
- ¹⁷⁷ *Hughes v. Pair*, 46 Cal. 4th 1035, 1047 (2009).
- ¹⁷⁸ *Id.* at 1044.
- ¹⁷⁹ *Semler v. Gen. Elec. Capital Corp.*, 196 Cal. App. 4th 1380, 1387 (2011); compare Cal. Civ. Proc. Code § 335.1 with Cal. Civ. Proc. Code § 338(a).
- ¹⁸⁰ Cal. Civ. Code § 51.7(a).
- ¹⁸¹ Cal. Civ. Code § 51(e)(5).
- ¹⁸² See California Civil Jury Instructions (CACI) 3063. Acts of Violence – Ralph Act – Essential Factual Elements (Civ. Code § 51.7).
- ¹⁸³ *OSJ PEP Tennessee LLC v. Harris*, No. CV 14-03741, 2014 WL 4988070, at *5 (C.D. Cal. Oct. 7, 2014).
- ¹⁸⁴ Cal. Civ. Code § 51(b).
- ¹⁸⁵ *In re M.S. v. A.G.*, 10 Cal. 4th 698, 719-20 (1995).
- ¹⁸⁶ *Beliveau v. Caras*, 873 F. Supp. 1393, 1399-1400 (C.D. Cal. 1995).
- ¹⁸⁷ *Winarto v. Toshiba Am. Elecs.*, 274 F.3d 1276, 1290 (9th Cir. 2001).
- ¹⁸⁸ *Ventura v. ABM Indus., Inc.*, 212 Cal. App. 4th 258, 270-71 (2012).
- ¹⁸⁹ Cal. Civ. Code § 52(b)(2).
- ¹⁹⁰ *United States v. Morgan*, 164 F.3d 1235, 1239 (9th Cir. 1999).
- ¹⁹¹ 20 U.S.C. § 1681(a).
- ¹⁹² *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1124–25 (N.D. Cal. 2013) ("Given the inherently sexual nature of rape and sexual assault, it is reasonable to conclude from such incidents that the perpetrator was motivated, at least in part, by victim's sex.").

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- ¹⁹³ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 642, 645 (1999).
- ¹⁹⁴ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009), citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999).
- ¹⁹⁵ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009).
- ¹⁹⁶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ¹⁹⁷ *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).
- ¹⁹⁸ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1028 (E.D. Cal. 2009).
- ¹⁹⁹ *Id.* at 1026.
- ²⁰⁰ *H.B. v. State Bd. of Educ.*, No. 4:14-CV-204-BO, 2015 WL 2193778, at *6 (E.D.N.C. May 11, 2015).
- ²⁰¹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ²⁰² *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013).
- ²⁰³ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).
- ²⁰⁴ *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *10 (N.D. Cal. Dec. 11, 2015).
- ²⁰⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).
- ²⁰⁶ *Hunter ex rel. Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 265 (D. Mass. 2006); see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999).
- ²⁰⁷ *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006).
- ²⁰⁸ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999).
- ²⁰⁹ *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *14 (N.D. Cal. Dec. 11, 2015).
- ²¹⁰ *Id.*
- ²¹¹ *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006).
- ²¹² *Takla v. Regents of the Univ. of Cal.*, No. 2:15-cv-04418-CAS(SHX), 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015).
- ²¹³ *Karasek v. Regents of the Univ. of Cal.*, 226 F. Supp. 3d 1009, 1030 (N.D. Cal. 2016).
- ²¹⁴ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998) (noting that considerations “comparable” to those underlying Title IX violations “led to our adoption of a deliberate indifference standard for claims under § 1983 ...”); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992) (looking to Section 1983 in holding that private plaintiffs could seek monetary damages against a school under Title IX for intentional discrimination); *Doe v. Willits Unified Sch. Dist.*, 473 F. App’x 775, 776 (9th Cir. 2012) (relying on Section 1983 case law in discussing the deliberate indifference standard under Title IX).
- ²¹⁵ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135-36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California’s personal injury statute of limitations).
- ²¹⁶ Cal. Civ. Proc. Code § 335.1.
- ²¹⁷ 18 U.S.C. § 2242(1).
- ²¹⁸ *United States v. Sneezzer*, 983 F.2d 920, 923 (9th Cir. 1992).
- ²¹⁹ 18 U.S.C. § 2242(2).
- ²²⁰ *United States v. Bruguier*, 735 F.3d 754, 758 (8th Cir. 2013).
- ²²¹ *United States v. James*, 810 F.3d 674, 686 (9th Cir. 2016).
- ²²² *Id.* at 679.
- ²²³ *Id.* at 681.
- ²²⁴ *United States v. Armstrong*, 166 F. App’x 949, 952 (9th Cir. 2006).
- ²²⁵ 18 U.S.C. § 3299.
- ²²⁶ 18 U.S.C. § 2243(a).
- ²²⁷ *United States v. Wilcox*, 487 F.3d 1163, 1168-69 (8th Cir. 2007).
- ²²⁸ 18 U.S.C. § 3299.
- ²²⁹ *United States v. Chatlin*, 51 F.3d 869, 872 (9th Cir. 1995).
- ²³⁰ *United States v. Rivera*, 43 F.3d 1291, 1298 (9th Cir. 1995).

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- ²³¹ 18 U.S.C. § 2241(a).
- ²³² See Sexual Abuse (18 U.S.C. § 2242(1)) for definition of “sexual act.”
- ²³³ 18 U.S.C. § 2246(4).
- ²³⁴ *United States v. Papakee*, 573 F.3d 569, 576 (8th Cir. 2009).
- ²³⁵ *United States v. Chatlin*, 51 F.3d 869, 872 (9th Cir. 1995).
- ²³⁶ 18 U.S.C. § 2241(b).
- ²³⁷ 18 U.S.C. § 2241(c).
- ²³⁸ 18 U.S.C. § 2241(d).
- ²³⁹ *United States v. Juvenile Male*, 564 U.S. 932, 933 (2011).
- ²⁴⁰ 18 U.S.C. § 3299.
- ²⁴¹ *United States v. Galindo-Galindo*, No. CR 08–872–TUC–CKJ (CRP), 2009 WL 166935, at *2 (D. Ariz. Jan. 23, 2009).
- ²⁴² 18 U.S.C. § 2246(3).
- ²⁴³ *Id.*
- ²⁴⁴ 18 U.S.C. § 2244.
- ²⁴⁵ 18 U.S.C. § 3299.
- ²⁴⁶ *United States v. Neil*, 312 F.3d 419, 420-23 (9th Cir. 2002).
- ²⁴⁷ *United States v. Wetchie*, 207 F.3d 632, 634 (9th Cir. 2000).
- ²⁴⁸ *United States v. Hile*, 626 F. App’x 674, 678 (9th Cir. 2015).
- ²⁴⁹ 18 U.S.C. § 2266(2).
- ²⁵⁰ 18 U.S.C. § 2266(7).
- ²⁵¹ *United States v. Hile*, 626 F. App’x 674, 678 (9th Cir. 2015).
- ²⁵² *Id.*
- ²⁵³ *United States v. Veal*, 138 F. App’x 902, 903-04 (9th Cir. 2005).
- ²⁵⁴ 18 U.S.C. § 2261A(2).
- ²⁵⁵ *United States v. Osinger*, 753 F.3d 939, 952 (9th Cir. 2014).
- ²⁵⁶ *United States v. Grob*, 625 F.3d 1209, 1212 (9th Cir. 2010).
- ²⁵⁷ 18 U.S.C. § 3282.
- ²⁵⁸ 18 U.S.C. § 2261(a)(1).
- ²⁵⁹ 18 U.S.C. § 2266(7).
- ²⁶⁰ 18 U.S.C. § 2261(a)(2).
- ²⁶¹ *United States v. Dowd*, 417 F.3d 1080, 1086 (9th Cir. 2005).
- ²⁶² *Id.* at 1089.
- ²⁶³ *Id.* at 1087.
- ²⁶⁴ *Id.* at 1089.
- ²⁶⁵ *Id.* at 1087.
- ²⁶⁶ *Id.* at 1084-86.
- ²⁶⁷ 18 U.S.C. § 3282.
- ²⁶⁸ 18 U.S.C. § 2262(a)(1).
- ²⁶⁹ 18 U.S.C. § 2262(a)(2).
- ²⁷⁰ *United States v. Veal*, 138 F. App’x 902, 903-04 (9th Cir. 2005).
- ²⁷¹ 18 U.S.C. § 3282.
- ²⁷² Cal. Civ. Code § 1708.5(a).
- ²⁷³ See, e.g., *Andrade v. Arby’s Rest. Group, Inc.*, 225 F. Supp. 3d 1115, 1130 (N.D. Cal. 2016); California Civil Jury Instructions (CACI) 1306 Sexual Battery – Essential Factual Elements.
- ²⁷⁴ Cal. Civ. Code § 1708.5(d).
- ²⁷⁵ Cal. Civ. Code § 1708.5(f).
- ²⁷⁶ See *Beliveau v. Caras*, 873 F. Supp. 1393, 1395-98 (C.D. Cal. 1995).
- ²⁷⁷ See *Jacqueline R. v. Household of Faith Family Church, Inc.*, 97 Cal. App. 4th 198, 207-08 (2002).
- ²⁷⁸ *Andrade v. Arby’s Rest. Group, Inc.*, 225 F. Supp. 3d 1115, 1130 (N.D. Cal. 2016).
- ²⁷⁹ *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 12 Cal. 4th 291, 296 (1995).

²⁸⁰ *Id.* at 298-301.

²⁸¹ See Robert D. Links, § 10:17 Gender-Based Discrimination: Discovery, Remedies, and Statute of Limitations (Cal. Civ. Prac.: Cal. Civ. Rights Litigation 2017) (“Section 1708.5 does not specify the limitations period governing claims brought pursuant to the section.” “... [T]he applicable limitations statute is the two-year statute for battery claims codified at Code Civ. Proc. § 335.1” “If the sexual battery was committed when the plaintiff was a minor, then Code Civ. Proc. § 340.1, the statute of limitations for childhood sexual abuse, provides the limitations period”).

²⁸² See Cal. Civ. Code § 52.4(c)(1).

²⁸³ Compare Cal. Civ. Code § 52(b)(2) with Cal. Civ. Code § 52.4(b).

²⁸⁴ Compare the two year statute of limitations for § 1708.5 (*supra*) with the three year statute of limitations for Cal. Civ. Code § 52.4(b).

²⁸⁵ Cal. Civ. Code § 52.4(a).

²⁸⁶ See Cal. Civ. Code § 51.9.

²⁸⁷ Cal. Civ. Code § 52.4(b).

²⁸⁸ Cal. Civ. Code § 1708.7(b)(7).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Cal. Civ. Code § 1708.7(b)(2).

²⁹² *Id.*

²⁹³ Cal. Civ. Proc. Code § 335.1.

²⁹⁴ California Criminal Jury Instructions (CALCRIM) 890 Assault with Intent to Commit Sex Offense (Pen. Code § 220(a), (b)).

²⁹⁵ See *People v. Bradley*, 15 Cal. App. 4th 1144, 1154 (1993).

²⁹⁶ See *People v. Peckham*, 249 Cal. App. 2d 941, 944-46 (1967).

²⁹⁷ *Id.* at 945.

²⁹⁸ *People v. Leal*, 180 Cal. App. 4th 782, 790 (2009), citing *People v. Maury*, 30 Cal. 4th 342, 399-400 (2003) (internal citations omitted).

²⁹⁹ *Id.* at 791.

³⁰⁰ *People v. Trotter*, 160 Cal. App. 3d 1217, 1222-23 (1984).

³⁰¹ *People v. Meichtry*, 37 Cal. 2d 385, 389 (1951).

³⁰² The statute of limitations period is based on the maximum punishment prescribed by statute for the offense. Cal. Penal Code § 805. When the victim is 18 or over, assault with intent to rape is punishable by imprisonment in the state prison for two, four, or six years. When the victim is under 18, it is punishable by imprisonment for five, seven, or nine years. When the offense occurs in the commission of a burglary of the first degree, it is punishable by imprisonment in state prison for life with the possibility of parole. Cal. Penal Code § 220(a)-(b).

³⁰³ Cal. Penal Code § 801.

³⁰⁴ Cal. Penal Code § 800.

³⁰⁵ Cal. Penal Code § 799.

³⁰⁶ Cal. Penal Code § 263.

³⁰⁷ Cal. Penal Code §§ 261.6, 261.7.

³⁰⁸ Cal. Penal Code § 261.6.

³⁰⁹ See *People v. Ireland*, 188 Cal. App. 4th 328, 336-37 (2010).

³¹⁰ *In re John Z.*, 29 Cal. 4th 756, 758 (2003).

³¹¹ See *People v. Ireland*, 188 Cal. App. 4th 328, 338 (2010).

³¹² *In re John Z.*, 29 Cal. 4th 756, 762 (2003).

³¹³ *People v. Ireland*, 188 Cal. App. 4th 328, 337-40 (2010).

³¹⁴ Cal. Penal Code § 261.

³¹⁵ *People v. Thompson*, 142 Cal. App. 4th 1426, 1437 (2006).

³¹⁶ Cal. Penal Code § 261.

³¹⁷ *People v. Thompson*, 142 Cal. App. 4th 1426, 1440 (2006).

³¹⁸ “Force” in § 261 has the common usage meaning, rather than any specialized legal definition. *People v. Griffin*, 33 Cal. 4th 1015, 1024 (2004).

³¹⁹ *Id.* at 1023 (quoting *People v. Young*, 190 Cal. App. 3d 248, 257-58 (1987)).

³²⁰ *Id.* at 1023.

³²¹ *Id.* at 1029.

³²² Cal. Penal Code § 799(b)(1)-(2).

³²³ See *People v. Johns*, 173 Cal. App. 2d 38, 46-47 (1959).

³²⁴ Cal. Penal Code §§ 801, 802.

³²⁵ Cal. Penal Code § 646.9(e).

³²⁶ Cal. Penal Code § 646.9(g).

³²⁷ *People v. Falck*, 52 Cal. App. 4th 287, 298-99 (1997).

³²⁸ *People v. McCray*, 58 Cal. App. 4th 159, 169-71 (1997).

³²⁹ See *People v. Norman*, 75 Cal. App. 4th 1234, 1240 (1999).

³³⁰ See *People v. Falck*, 52 Cal. App. 4th 287, 291-93 (1997).

³³¹ A technology-based stalking charge may be accompanied by other statutes such as Cal. Penal Code § 422 (criminal threats), Penal Code § 653.2 (Use of electronic communication to instill fear or to harass).

³³² *People v. Gonzalez*, 2 Cal. 5th 1138, 1143 (2017).

³³³ The term “cyberstalking” is not explicitly mentioned under § 646.9.

³³⁴ See Cal. Penal Code § 646.9.

³³⁵ Cal. Civ. Code § 1708.7(b)(3); see also the definition of “electronic communication” in 18 U.S.C. § 2510(12).

³³⁶ *People v. Lopez*, 240 Cal. App. 4th 436, 452-53 (2015), as modified on denial of reh'g (Sept. 30, 2015).

³³⁷ Cal. Penal Code § 646.9(a)-(c).

³³⁸ Cal. Penal Code § 802.

³³⁹ Cal. Penal Code § 801.

³⁴⁰ Cal. Penal Code § 314.

³⁴¹ *Nunez v. Holder*, 594 F.3d 1124, 1134 (9th Cir. 2010).

³⁴² *Id.* at 1135.

³⁴³ *In re Smith*, 7 Cal. 3d 362, 366 (1972).

³⁴⁴ Cal. Penal Code §§ 801, 802.

³⁴⁵ A person convicted of exposing him- or herself in a public place (satisfying element 2 supra) is guilty of a felony for each subsequent conviction under this element. If convicted, he or she is also guilty of a felony if he or she has a previous conviction under Section 288 (Lewd or lascivious acts involving children). Otherwise, it is a misdemeanor. See Cal. Penal Code § 314.

³⁴⁶ See Cal. Penal Code § 422.6.

³⁴⁷ See Cal. Penal Code § 802(a).

³⁴⁸ Cal. Penal Code § 647(j)(4)(A).

³⁴⁹ Cal. Penal Code § 647(j)(4)(B).

³⁵⁰ Cal. Penal Code § 647(j)(4)(C).

³⁵¹ *People v. Iniguez*, 247 Cal. App. 4th Supp. 1, at *9 (2016).

³⁵² *Id.* at *11.

³⁵³ See Cal. Penal Code § 802.

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