

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement**

NOTICE OF PROPOSED RULEMAKING

**Subject Matter of Regulations:
Sexual Violence and Harassment Prevention Training for Property Service Workers**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
New Sections 13820 – 13822**

NOTICE IS HEREBY GIVEN that the Labor Commissioner proposes to adopt regulations governing sexual harassment training for property service workers. These regulations, new sections 13820 through 13822, are located in new Article 6 of new Subchapter 13 of existing Chapter 6, Division 1, Title 8 of the California Code of Regulations (“CCR”).

PROPOSED REGULATORY ACTION

The Labor Commissioner proposes to adopt regulations under new Subchapter 13 of Chapter 6 of Division 1 consisting of the following:

- Article 6. Sexual Violence and Harassment Prevention Training for Property Service Workers
 - Section 13820 Definitions
 - Section 13821 Standards Regarding Timing, Documentation, Languages for Training
 - Section 13822 Objectives and Content

The proposed regulations in this rulemaking proposal only pertain to the *sexual harassment training requirement* enacted under AB 1978 (2016). The Labor Commissioner is also proposing regulations pertaining to registration of janitorial employers in a separate rulemaking proposal. The proposed rulemaking addressing registration will be concurrently filed with a separate OAL file number and rulemaking contents.

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: May 20, 2019
Time: 10:00 a.m. to 5:00 p.m., or conclusion of business
Place: Junipero Serra State Office Building
Carmel Room, 1st Floor
107 South Broadway
Los Angeles, CA 90012

The State Office Building and designated room are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Division of Labor Standards Enforcement at 510-285-2118 to request an accommodation, or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Labor Commissioner requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Labor Standards Enforcement. **The written comment period closes at midnight on May 20, 2019.** The Labor Commissioner will consider only comments received at the Division by that time. Equal weight will be accorded to comments presented at the hearing and to other written comments received by midnight on that date by the Division.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Jennifer Stevens, Legislative Analyst and Regulations Coordinator
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825

Written comments may also be sent electronically (via email) using the following email address: DLSERegulations@dir.ca.gov

Written comments may also be submitted via facsimile transmission (FAX), addressed to the above-named contact person at (916) 263-2920. Due to the inherent risks of non-delivery by facsimile transmission, the Division suggests, but does not require, that a copy of any comments transmitted by facsimile transmission also be submitted by regular mail.

Comments sent to other email addresses or facsimile numbers will not be accepted. Comments sent by email or facsimile are subject to the deadline set forth above for written comments.

AUTHORITY AND REFERENCE

Labor Code section 1422 authorizes the Labor Commissioner, Chief of the Division of Labor Standards Enforcement (“DLSE”), to adopt regulations to implement Part 4.2 (sections 1420 through 1434), Property Service Workers Protection, of Labor Code Division 2. Applicable to janitorial services contractors,¹ Labor Code section 1429.5 mandates the adoption of a biennial in-person sexual violence and harassment prevention training requirement. The proposed regulations implement, interpret, and make specific Labor Code sections 1429(a)(10) and 1429.5.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

In 2015, the PBS documentary series *Frontline* – in collaboration with Univision, the Investigative Reporting Program at the University of California (“UC”), Berkeley, the Center for Investigative Reporting, and PBS station KQED – produced *Rape on the Night Shift*, an exposé of the prevalence, gravity, and impunity of sexual harassment of janitorial workers across the United States, many of whom are immigrant women. According to a subsequent report by the Labor Occupational Health Program at UC Berkeley, the janitorial services industry “is structured in a way that isolates workers who are uniquely vulnerable to sexual harassment, and then creates conditions in which workers are afraid to step forward to report harassment.”²

In September 2016, Assembly Bill (“AB”) 1978³ was enacted to add Part 4.2 to the Labor Code requiring janitorial services contractors to register annually with the Labor Commissioner in accordance with prescribed procedures. The registration requirement went into effect on July 1, 2018. Registration requirements include paying application and annual renewal fees, providing specified information, and maintaining records as prescribed.

Effective January 1, 2020, pursuant to Labor Code sections 1429(a)(10) and 1429.5, registration and renewal of registration requires sexual violence and harassment prevention training biennially for both janitorial workers and their supervisors. This regulatory proposal sets forth the sexual violence and harassment training requirements.

Section 1429.5 mandates consideration of the Fair Employment and Housing Act (“FEHA”) requirements of Government Code section 12950.1 in developing this proposal. Since enactment of AB 1978, Senate Bill (“SB”) numbers 396 (2017) and 1343 (2018) were enacted, changing and expanding FEHA’s sexual harassment training requirements under Government Code section 12950.1. SB 396 added the requirement to provide harassment training based on gender identity, gender expression, and sexual orientation. Fair Employment and Housing Council implementing regulations, 2 CCR § 11024, will add, among other things, peer-to-peer trainers as individuals qualified to conduct training. SB 1343 added a requirement to provide training to

¹ Section 1420(e)(1) defines a covered employer as “any person or entity that employs at least one employee and one or more covered workers and that enters into contracts, subcontracts, or franchise arrangements to provide janitorial services.”

² Helen Chen, Alejandra Domenzain, and Karen Andrews (May 2016), *The Perfect Storm: How Supervisors Get Away with Sexually Harassing Workers Who Work Alone at Night*, Report of the Labor and Occupational Health Program, University of California, Berkeley, available at <http://lohp.org/the-perfect-storm/>.

³ AB 1978 was introduced by San Diego Assemblymember Lorena Gonzalez.

non-supervisors, expanded the FEHA training requirement to employers with five or more employees, and directed the Department of Fair Employment and Housing (“DFEH”) to provide training courses on its website. This regulatory proposal contemplates the existing requirements of Government Code section 12950.1 and the implementing regulations, and ensures alignment with FEHA’s sexual harassment training content and qualified trainer requirements.

Many large unionized janitorial service contractors are already implementing similar provisions in workers’ contracts. This regulatory proposal is intended to set sexual harassment prevention standards for all covered janitorial employers regardless of size or unionization and ensure that those standards are met through a registration process that improves worker safety, participation, transparency, accountability, and enforcement.

Anticipated Benefits of the Proposed Regulation:

Implementing Part 4.2 of Labor Code Division 2 by adopting California Code of Regulations Title 8 sections 13820 through 13822 would provide benefits for both janitorial services workers and their employers. Reducing or eliminating workplace sexual harassment would enable janitorial workers to work without facing intimidation or coercion. Those who might have been driven by harassment to quit their jobs would benefit psychologically and monetarily from retaining a stable income and work schedule. Employers would benefit from better job performance by workers, reduction of business disruption, lower staff turnover, and lower liability. Reducing or eliminating workplace sexual harassment would also have broader impacts, reducing sex discrimination in the California labor market overall and promoting social equity generally.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations:

The Labor Commissioner evaluated the existing all-industry sexual harassment training regulations promulgated by the Fair Employment and Housing Council to implement the training requirement in Government Code section 12950.1. In coordination with the advisory committee, the Labor Commissioner structured these regulations concerning sexual violence and harassment prevention training for property service workers to be consistent with those existing regulations.

STAKEHOLDER INPUT

Labor Code section 1429.5 mandates a process for adopting regulations to implement the new sexual violence and harassment training requirement. Accordingly, the Director of the Department of Industrial Relations (“DIR”) convened an advisory committee to provide input and recommendations on the proposal. The advisory committee included representatives of:

- DIR;
- DLSE;
- Division of Occupational Safety and Health;
- DFEH;
- The Service Employees International Union, United Service Workers West, which represents over 40,000 property service workers in California;

- Four janitorial services employers; and
- Advocacy groups for victims of sexual assault and domestic violence, women’s civil rights, property service workers, and occupational health.

The Advisory Committee met on January 24, June 13, and October 11, 2017, and on February 4 and 11, 2019, providing input at these meetings and in correspondence.

Proposed new sections 13820 through 13822 of Title 8 of the California Code of Regulations are the result of extensive stakeholder involvement. The proposed regulations specify trainer qualifications and prescribe the frequency, duration, language, literacy level, modes, techniques, content, and documentation of sexual harassment prevention training for the janitorial services industry.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Labor Commissioner has made the following initial determinations:

Mandate on local agencies and school districts: None

Cost or savings to any state agency: None.

Cost to any local agency or school district that must be reimbursed in accordance with Government Code Sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Cost impact on a representative private person or business:

The cost of the 2 hour training is \$5.4 million initially and biennially (ongoing costs), or \$2.7 million annually. Initial costs for a typical small business are estimated to be \$646. Initial costs for a typical business are estimated to be \$7,850. Ongoing costs (every 2 years based on the requisite frequency of the training) are estimated to be \$646 and \$7,850 for small and typical businesses, respectively.

Significant statewide adverse economic impact directly affecting businesses and individuals, including the ability of California businesses to compete with businesses in other states: None.

Significant effect on housing costs: None.

Effect on Small Business:

California Government Code section 11346.3 defines small businesses as businesses that are independently owned and operated, not dominant in their field of operation, and have fewer than 100 employees. The California Employment Development Department reports that 95.8% of the businesses in California’s Administrative and Support Services industry (NAICS 561) have

fewer than 100 employees in the third quarter 2016.⁴ It is estimated that a similar percentage of small businesses in the janitorial services industry will be impacted. Ongoing costs (every 2 years based on the requisite frequency of the training) are estimated to be \$646 for small businesses.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENTS

The Labor Commissioner does not anticipate the creation or elimination of jobs within the state attributed to this proposal. The costs and benefits will be borne by existing businesses and will not create or eliminate businesses. There is no anticipated expansion of businesses currently doing business within the state attributed to this proposal. The proposal will not have a significant adverse economic impact on business based on analysis of the associated costs of compliance.

Labor Code section 1429.5 will immediately impact 5,684 janitorial services organizations who will be mandated to provide the sexual violence and harassment prevention training to 110,189 employees. The industry employer estimate is obtained from the Employment Development Department for the particular NAICS or industry code associated with the janitorial services industry (NAICS 56172) that are privately owned.⁵

California Government Code section 11346.3 defines small businesses as businesses that are independently owned and operated, not dominant in their field of operation, and have fewer than 100 employees. The California Employment Development Department reports that 95.8% of the businesses in California's Administrative and Support Services industry (NAICS 561) have fewer than 100 employees in the third quarter 2016. It is estimated that a similar percentage of small businesses in the janitorial services industry will be impacted.

The average weekly wage for this industry is \$508. It is estimated that workers in this industry work an average 40 hours per week, so the average hourly rate is approximately \$12.70 per hour.⁶

⁴ California Economic Development Department Labor Market Info. *Size of Business Data – 2006 – present*. Accessed 11/30/2017:

http://www.labormarketinfo.edd.ca.gov/LMID/Size_of_Business_Data.html

⁵ California Economic Development Department Labor Market Info. *Quarterly Census of Employment and Wages (QCEW) Industry Detail* (2016). Accessed 11/30/2017:

http://www.labormarketinfo.edd.ca.gov/qcew/CEW-Detail_NAICS.asp?MajorIndustryCode=1024&GeoCode=06000000&Year=2016&OwnCode=50&Qtr=02

⁶ California Economic Development Department Labor Market Info. *Quarterly Census of Employment and Wages (QCEW) Industry Detail* (2016). Accessed 11/30/2017:

http://www.labormarketinfo.edd.ca.gov/qcew/CEW-Detail_NAICS.asp?MajorIndustryCode=1024&GeoCode=06000000&Year=2016&OwnCode=50&Qtr=02

The cost of hiring a qualified in-person trainer is estimated at \$456 based on the average hourly mean wage between a training and development specialist and an attorney,⁷ noting industry standards for preparation and training time.⁸

Therefore, the cost of the 2 hour training is \$5.4 million initially and biennially (ongoing costs), or \$2.7 million annually. Initial costs for a typical small business are estimated to be \$646. Initial costs for a typical business are estimated to be \$7,850. Ongoing costs (every 2 years based on the requisite frequency of the training) are estimated to be \$646 and \$7,850 for small and typical businesses, respectively.

It is estimated that the prevention of workplace sexual harassment and violence incidents through mandated training will accrue benefits for workers, employers, and society including: reduction in injuries and health care costs for the victim, increased productivity, and reduced employee absenteeism.

A quantifiable benefit of the proposed regulation is determined by multiplying the number of lost time injuries (Days Away from Work, DAFW) that will be prevented by the proposed regulation by the societal cost of those injuries.

The number of injuries currently occurring to employees covered by the proposed regulation is calculated by multiplying the number of annual workplace violence injuries in the janitorial industry in California by the share of workplace violence cases attributed to rape/sexual assault injuries. Per the Bureau of Labor Statistics, in 2015 in California, there were 60 DAFW workplace violence injuries in the janitorial services sector.⁹ U.S. Department of Justice reported that rape/sexual assault cases constitute about 2.3% of non-fatal workplace violence cases.¹⁰ Therefore, approximately 1.4 rape/sexual assault DAFW case per year occurs within this industry. DeLisi et al. (2010) estimated that each rape case exacts \$448,532 (in 2008 USD) or \$510,305 in current dollars¹¹ in societal costs.¹² The annual estimated societal cost is \$704,221.

⁷ California Economic Development Department Labor Market Info. *OES Employment and Wages*. Accessed 11/30/2017: <http://www.labormarketinfo.edd.ca.gov/data/oes-employment-and-wages.html>

⁸ American Faculty Association. *Hours for Teaching and Preparation Rule of Thumb: 2-4 Hours of Prep for 1 Hour of Class*. Accessed 11/30/2017: <http://americanfacultyassociation.blogspot.com/2012/02/hours-for-teaching-and-preparation-rule.html>

⁹ Data derived from Bureau of Labor Statistics. *Occupational Injuries/Illnesses and Fatal Injuries Profiles*. Accessed 11/30/2017: <https://data.bls.gov/gqt/InitialPage>

¹⁰ Harrell, E. *Workplace Violence, 1993-2009 National Crime Victimization survey and the Census of Fatal Occupational injuries*. U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics Special Report NCJ 233231, March 2011. Accessed 11/30/2017: <https://www.bjs.gov/content/pub/pdf/wv09.pdf>

¹¹ Coinnews Media Group LLC. *US Inflation Calculator*. Accessed 11/30/2017: <http://www.usinflationcalculator.com/>

¹² DeLisi, M., Kosloskia, A., Sweena, M., Hachmeistera, E., Moorea, M., & Drury, A. (2010). *Murder by numbers: Monetary costs imposed by a sample of homicide offenders*. *The Journal of Forensic Psychiatry*

To estimate employers' economic benefits of the proposal, interpreted as the prevention of incidents of sexual harassment within the janitorial industry, DIR used data reported to the California workers' compensation information system ("WCIS").¹³

For workers' compensation claims in the janitorial sector with dates of injury from 2012-2016, there was an average of 2.4 post traumatic stress disorder ("PTSD") related workers' compensation cases with an injury description indicating sexual violence/ harassment reported per year.

For the same period, the average paid cost for medical services of a PTSD workers' compensation claim in the janitorial sector was \$14,886. With indemnity, an estimated additional \$7,334 is the average paid per stress claim with permanent disability,¹⁴ for a total annual estimated employer cost of \$53,328.

The number of sexual violence and harassment incidents that do not result in an injury with days away from work are believed to exceed the number of reported sexual violence and harassment incidents with lost workdays by orders of magnitude and number in the tens of thousands of incidents per year for the employers covered by the proposal.¹⁵ Although this amount cannot be estimated, the prevention of these incidents should be documented as another benefit of the proposal.

Each year, based on available data, this proposal is conservatively estimated to provide \$704,221 in societal benefits and \$53,328 in employer benefits through the prevention of sexual harassment incidents in the workplace, for a total of \$757,549.

& Psychology, 21, 501-513. doi:10.1080/14789940903564388. Accessed 11/30/2017:
<http://www.tandfonline.com/doi/abs/10.1080/14789940903564388>

¹³ WCIS uses electronic data interchange (EDI) to collect comprehensive information from claims administrators to help the Department of Industrial Relations oversee the state's workers' compensation system. Electronic transmission of first reports of injury was required beginning March 1, 2000 and electronic versions of benefit notices were mandated as of July 1, 2000. Electronic reporting of medical billing data is required for any medical service that occurs on or after Sep. 22, 2006.

¹⁴ Per WCIRB, the average paid indemnity cost for a permanent disability psychiatric and stress claim is \$7,334. See WCIRB (2017). *Report on 2016 California Workers' Compensation Losses and Expenses*. Exhibit 6. Accessed 11/30/2017:
https://www.wcirb.com/sites/default/files/documents/report_on_2016_ca_wc_losses_and_expenses_complete.pdf

¹⁵ Hinkley, S. et al. (2016) *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*. University of California, Berkeley, Center for Labor Research and Education. <http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf>

CONSIDERATION OF ALTERNATIVES

Pursuant to Government Code Section 11346.5(a)(13), the Labor Commissioner must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the Labor Commissioner's attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposal described in this Notice.

The proposal is the result of significant and collaborative stakeholder involvement from labor and industry groups. The proposal aligns with related FEHA provisions, incorporates many suggestions from stakeholders, and meets the mandate in Labor Code section 1429.5. Alternative options were discussed in lieu of the proposed two-hour training length, which is the same as DFEH's sexual harassment training for supervisory employees per 2 CCR § 11024(a)(11). A four-hour training was considered, however, there were no quantifiable benefits to the four-hour training versus the two-hour training, and costs were considerably higher (\$2.7 million for two hour versus \$4.1 million for four hour training). Therefore, the two-hour training length was determined to be the optimal and effective duration.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, and proposed text of the regulations. Also included are documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Department of Industrial Relations' website at www.dir.ca.gov. To access them, click on the "Laws & Regulations" button and follow the link for "Rulemaking - Proposed Regulations." There you will find all of the agencies' current rulemaking proceedings. Scroll down the list to find the Sexual Violence and Harassment Prevention Training for Property Service Workers rulemaking link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Division of Labor Standards Enforcement, 2031 Howe Avenue, Suite 100, Sacramento, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in

writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Jennifer Stevens, Legislative Analyst and Regulations Coordinator
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
E-mail: jstevens@dir.ca.gov

The telephone number of the contact person is (916) 263-1563.

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

If the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Laura Moskowitz, Staff Attorney
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
E-mail: lmoskowitz@dir.ca.gov

The telephone number of the backup contact person is (415) 703-5252.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Labor Commissioner makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Department of Industrial Relations' website at www.dir.ca.gov/Rulemaking/DIRProposed.html.

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the DLSE's mailing list.

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, commencing with section 13820. The text of the final regulations will also be available through the website of the Office of Administrative Law at www.oal.ca.gov.