

## *Comments*

# **Ya Basta! The Solutions to Sexual Harassment in the Workplace for Women Janitors Working at Nighttime When Nobody Can Hear Them**

By SANDRA BELTRAN, ESQ.\*

### **Introduction**

**“YA BASTA!”**<sup>1</sup> SAID LETICIA SOTO in a letter she wrote to her rapist when she referred to herself as the invisible woman.<sup>2</sup> Leticia S., like many other Latina women, came to the United States with the hope of providing a better life for her children.<sup>3</sup> Leticia S. came from Mexico City as a happy and hopeful single mother, who imagined herself singing through the Los Angeles skyscrapers while she cleaned them.<sup>4</sup> Never did she imagine that one day she would be running away from her rapist through those Los Angeles skyscrapers.<sup>5</sup> Leticia S. recalls her rapist asking her if she was “an illegal,” then stating, “nobody here cares about illegals; they’re nothing; they’re trash.”<sup>6</sup> Leticia S. describes the day she faced her aggressor in her letter: she was alone, in an isolated part of the building in the middle of the night—no one

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\* University of San Francisco School of Law, Class of 2019. Thank you to my parents who always taught me to fight for justice. This piece is near and dear to my community, of being brought up in the property service industry. One too many times the voices of the most marginalized have been oppressed and traumatizing incidents in the workplace have been normalized going unnoticed for far too long. Gracias mujeres por no callar, por su valentia, ahora es cuando!

1. Ya Basta means stop it now.
2. Leticia Soto, *Letter from an Immigrant Woman to Her Rapist*, 26 UCLA WOMEN’S L.J. 149–54 (2019).
3. *Id.* at 149–50.
4. *Id.* at 150.
5. *Id.*
6. *Id.*

could hear her screams or her fight.<sup>7</sup> Leticia S. fought her aggressor until he punched her in the head and she could only see black.<sup>8</sup> Leticia S. had become a victim of rape while on the nightshift.<sup>9</sup>

Sadly, Leticia S. is just one of many women facing sexual assault in the workplace.<sup>10</sup> Just a few hours away from Leticia S., in Bakersfield, California, Erika Morales faced her own struggle in a lawsuit she brought against the property service company, ABM Industries, Inc.<sup>11</sup> Erika started the battle against sexual assault on the nightshift, and is an inspiration to many assaulted women with hopes of being heard.<sup>12</sup> Erika's traumatic experience began when she was assaulted by her supervisor, Jose Vasquez, who is a registered sex-offender. In ABM's hiring application, applicants are asked if they have ever been convicted of a crime—Jose left this section blank.<sup>13</sup> Despite the fact that Jose had previously been in jail for raping a teenager before working at ABM, ABM hired him without verifying his criminal past.<sup>14</sup>

Jose assaulted many women, including Erika, while working at ABM.<sup>15</sup> Jose watched Erika work, until he decided he could no longer just watch her and attempted to rape her in an area where he knew there were no cameras.<sup>16</sup> Erika tried to scream but no one could hear her.<sup>17</sup> She managed to put up a fight and get away, though she still doesn't know how.<sup>18</sup> Although Erika fought Jose, he was able to rip off some of her clothes, and left laughing.<sup>19</sup> After the assault, Erika quit her job because she could no longer take the abuse—telling their supervisor, “you know what's happening.”<sup>20</sup>

Erika became the lead plaintiff in a sexual harassment case against ABM, in which the Equal Employment Opportunity Commission (“EEOC”) represented twenty other women who alleged ABM did not protect them against their assaulters.<sup>21</sup> Before this lawsuit,

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7. *Id.* at 150–51.

8. *Id.* at 151.

9. *Id.*

10. *Frontline: Rape on the Night Shift* (PBS television broadcast Jan. 16, 2018).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

many women sent letters to ABM pleading for help, asking for protection from the abuse they were experiencing.<sup>22</sup> ABM did nothing in response to the letter and reported abuse—it wasn't until after the company faced legal consequences that Erika's assailant quit.<sup>23</sup> Erika's assailant was never convicted of any criminal charges.<sup>24</sup>

“Between one third and one half of women are sexually harassed at some point in their working life.”<sup>25</sup> Statistics show that the risk of sexual harassment in the workplace is even higher in industries of predominantly male workers.<sup>26</sup> Female janitors, like Leticia S., work in environments where they are isolated with men, increasing their risk of being sexually assaulted.<sup>27</sup> Another example is Maria Bojorquez, who cleaned offices in the San Francisco Ferry Building and worked in fear of being attacked because there was no one to protect her while she worked.<sup>28</sup> Maria's fear was validated when her supervisor raped her and then told her no one would believe her if she tried to complain.<sup>29</sup>

Statistics show that around 5,000 to 17,000 sexual assaults occur annually in the workplace.<sup>30</sup> Sexual assaults are increased by factors such as gender, race, culture, and legal status.<sup>31</sup> In the janitorial industry alone, 70% of workers are undocumented, with almost half of them being women.<sup>32</sup> Women in the janitorial industry are sexually harassed at higher rates than men, have fewer protections, and have higher rates of sexual assaults by their co-workers.<sup>33</sup> In some instances, co-workers are family friends, which makes assault even more difficult for victims to address and report. For example, Leticia Zuniga worked for Service Management Systems and was managed by her husband's

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22. *Id.*

23. *Id.*

24. *Id.*

25. HELEN CHEN, ALEJANDRA DOMENZAIN & KAREN ANDREWS, *THE PERFECT STORM: HOW SUPERVISORS GET AWAY WITH SEXUALLY HARASSING WORKERS WHO WORK AT NIGHT* (2016), <https://lohp.berkeley.edu/the-perfect-storm/> [<https://perma.cc/8JWU-BVZ3>].

26. *Id.* at 4.

27. *Frontline*, *supra* note 10.

28. *Id.*

29. *Id.*

30. CHEN, *supra* note 25, at 4.

31. See Jessica Stender, *Enough Is Enough: Confronting Sexual Harassment and Violence in the Janitorial Industry: From Equal Rights Advocates*, NEWS BAKERRS (Aug. 25, 2017, 3:52 AM), <https://bakerrts.blogspot.com/2017/08/enough-is-enough-confronting-sexual.html> [<https://perma.cc/BF3R-ZRNV>].

32. *Id.*

33. CHEN, *supra* note 25, at 4.

friend, who had the power to hire and fire her.<sup>34</sup> Leticia Z. didn't tell anyone when her manager raped her because she was threatened with deportation, felt ashamed, and thought she had to endure the harassment to keep her job for the sake of her children, and was conflicted due to her husband's relationship with her rapist.<sup>35</sup> Leticia Z. left the company without filing a complaint and with emotional trauma that has affected her and her children since.<sup>36</sup> Months later, Leticia Z. filed a police report, followed by a lawsuit against Service Management Systems.<sup>37</sup>

Sexual harassment among janitorial workers is often times the elephant in the room—everyone knows about it, but it's rarely reported or inquired about.<sup>38</sup> When employers and employees are aware of harassment but it goes unreported, the assault simply becomes office gossip.<sup>39</sup> Sexual harassment happens in many places, and the halls of skyscrapers are no exception. The underreporting of rape is amplified by the workplace structure of the janitorial industry: janitorial women work alone at night with male supervisors, making them particularly vulnerable, and many struggle with language barriers, documentation status, and lack of access to legal options.<sup>40</sup> Further, workplace culture, as well as ineffective policies and procedures contribute to sexual harassment.<sup>41</sup> Immediate reporting is critical in preventing sexual harassment in the workplace, and a lack of reporting only inhibits recourse to victims or prevention of future assaults.

Sexual harassment in the workplace has been an issue for many years but is only now being addressed in a public manner.<sup>42</sup> After women, supporters, and allies rallied for women's rights in the workplace, the legislature has finally responded with the creation of The Property Services Workers Protection Act ("A.B. 1978") in 2016.<sup>43</sup>

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34. *Frontline*, *supra* note 10.

35. *Id.*; Olivia LaVecchia, *The Perfect Victim: Exploitation and Threat of Deportation*, CITY PAGES (May 29, 2013), <http://www.citypages.com/news/the-perfect-victim-exploitation-and-threat-of-deportation-6768234> [<https://perma.cc/469F-3HVP>].

36. *Frontline*, *supra* note 10.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*; Stender, *supra* note 31.

41. *Frontline*, *supra* note 10; Stender, *supra* note 31.

42. *Frontline*, *supra* note 10.

43. *Frontline*, *supra* note 10; See Assemb. B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016) (at the time this Comment was written, Assembly Bill 1978 was not yet codified. In order to preserve the original organization of the information in the Bill as per how the author references it, this Comment will continue to cite the Bill rather than the code sections. For reference, the Bill is now codified in CAL. LAB. CODE §§ 1420–1434 (West 2016)).

Janitorial workers, like Leticia S. and Erika, are determined to stop sexual harassment as well as the lack of response on behalf of employers. Leticia S., along with many other women, took their concerns to the California State House and fought back against their aggressors to gain protection in the workplace.<sup>44</sup> Shedding public light on the issues of sexual harassment against janitorial workers started with the video, “Rape on the Nightshift,” made by Leticia Z., Leticia S., Erika, and other women, who spoke out about the lack of protection offered to women by their employers.<sup>45</sup> The video empowered janitors and activists to proactively end rape in the nightshift.<sup>46</sup> They lobbied in Sacramento just two days before the Assembly voted on A.B. 1978, which offers protections against sexual harassment to nighttime workers.<sup>47</sup>

A.B. 1978 helps female nighttime janitorial workers because it requires employers to provide anti-sexual harassment training to all employees and resolves joint liability issues.<sup>48</sup> However, A.B. 1978 is insufficient because it does not provide sufficient penalties for failure to follow the law, and fails to address the cultural, racial, gender and immigration issues involved. The law should be revised to mandate specific requirements within training, integrate the U-Visa procedures into sexual harassment complaint procedures, scrutinize hiring and staffing decisions for nighttime shifts, increase security measures, and create full coordination among administrative agencies.

Part I of this Comment examines issues in the workplace in regard to sexual harassment, introduces women who have fought against their harassers in the workplace, and examines reasons why sexual harassment is still a rising problem in the workplace despite policies and procedures implemented by employers and enacted laws. Part II explains A.B. 1978, the type of resources workers had before the law was enacted, and what A.B. 1978 addresses and changes for women janitors working at night. Part III presents necessary additions to A.B. 1978 that would better deter sexual harassment, including mandatory training for employers.

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44. *Frontline*, *supra* note 10.

45. Bernice Yeung, *A Group of Janitors Started a Movement to Stop Sexual Abuse*, FRONTLINE (Jan. 16, 2018), <https://www.pbs.org/wgbh/frontline/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse/> [<https://perma.cc/D4CN-ZU8Z>].

46. *Frontline*, *supra* note 10.

47. *Frontline*, *supra* note 10; Assemb. B. 1978.

48. Assemb. B. 1978.

## I. Sexual Harassment Through a Nighttime Janitorial Worker's Lens

### A. Issues in the Nightshift and Statistics

“As many as thirty five to fifty percent of women are sexually harassed at some point in their working life.”<sup>49</sup> The percentage is even higher in low-wage paying industries, such as property service workers—also known as janitors.<sup>50</sup> As many as three out of every four janitors experience sexual harassment, according to a report done by the Labor Occupational Health Program at the University of California, Berkeley in May 2016.<sup>51</sup> The sexual harassment rate is increased by low bid contractors who skimp on human resources support, legal compliance, and lower labor standards to increase profit.<sup>52</sup> This increases instances of sexual harassment since sexual harassment training is not a priority.<sup>53</sup> Many janitors are immigrants and people of color, which contributes to them being disproportionately affected by workplace sexual harassment.<sup>54</sup>

Although more men occupy the janitorial industry than women, most cleaning roles are occupied by women, with men in supervisor and foreman positions.<sup>55</sup> Men in roles of authority increases women janitorial workers' vulnerability, which is exacerbated by their gender and undocumented status, and leaves women susceptible to fear and oppression.<sup>56</sup> This epidemic is happening to women everywhere in the United States.

Sexual harassment includes anything from “unwanted sexual advances to visual, verbal, or physical conduct by an aggressor.”<sup>57</sup> Many times, victims experience all of the above.<sup>58</sup> Women in the property service industry often work alone inside banks, malls, and office build-

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49. CHEN, *supra* note 25, at 4.

50. *Id.* at 1.

51. *Id.* at 4.

52. *Id.*

53. *Id.*

54. Ericka Cruz Guevarra, *California's Janitors, Security Guards Face Inferior Working Conditions*, KQED (Mar. 9, 2016), <https://www.kqed.org/news/10889595/californias-janitors-security-guards-face-inferior-working-conditions> [<https://perma.cc/8FRH-3NSG>].

55. CHEN, *supra* note 25, at 5; E. Mazareanu, *Share of Janitors and Building Cleaners in the United States in 2019, by Gender*, STATISTA (Jan. 23, 2020), <https://www.statista.com/statistics/889880/share-of-janitors-and-building-cleaners-in-the-us-by-gender/> [<https://perma.cc/8MTA-BBK3>].

56. CHEN, *supra* note 25, at 6.

57. *Id.* at 3.

58. *Id.*; Gabriela Parra, *Immigration Policy for Workplace Violence and Undocumented Women: State-Based Solutions for Wisconsin*, 30 WIS. J.L. GENDER & SOC'Y 99 (2015).

ings.<sup>59</sup> While many of us work by day, they clean at night—often working shifts alone—supervised only by an on-site supervisor.<sup>60</sup> Janitorial workers often experience sexual harassment by their supervisors in this isolated setting.<sup>61</sup> For example, in a Washington state study, 85% of workers who were raped in the workplace worked alone.<sup>62</sup>

Sexual harassment of women, specifically janitorial women, by men in power is not an anomaly. Leticia S., Leticia Z., and Erika are just three examples of women who were sexually harassed by their supervisors.<sup>63</sup> Countless of other women janitors working the night-shift alone have had the same experience.<sup>64</sup>

The effects of sexual harassment last long after the assault is over. The harassment often results in earning losses because women either quit their jobs, are terminated, or their hours are cut after they complain.<sup>65</sup> Women also suffer emotionally and develop mental illnesses, such as depression and anxiety, due to the sexual assault.<sup>66</sup> These mental illnesses are often accompanied by physical symptoms, such as: headaches, chronic joint pains, limb pain, gastrointestinal problems, tiredness, sleep disturbances, psychomotor activity changes, and appetite changes.<sup>67</sup> These physical symptoms may prevent women from seeking another job or playing an active role in their children's lives as caregiver and provider.<sup>68</sup>

Undocumented women who are assaulted may lack access to medical care, which causes illnesses to go untreated.<sup>69</sup> The government estimates that around 11.2 million undocumented workers do not qualify for health insurance and have to seek other resources, such as student medical clinics.<sup>70</sup> Unfortunately, many undocumented workers do not know about these alternative resources, making it harder for them to seek medical help.

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59. *Frontline*, *supra* note 10.

60. *Id.*

61. *Id.*

62. CHEN, *supra* note 25, at 5.

63. *Frontline*, *supra* note 10.

64. *Id.*

65. See Feldblum, *infra* note 75.

66. Madhukar H. Trivedi, *The Link Between Depression and Physical Symptoms*, 6 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 12, 12 (2004).

67. *Id.* at 12, 15.

68. *Id.*

69. Ruben Castaneda, *Where Can Undocumented Immigrants Go for Health Care?*, U.S. NEWS (Nov. 2, 2016, 1:01 PM), <https://health.usnews.com/wellness/articles/2016-11-02/where-can-undocumented-immigrants-go-for-health-care> [<https://perma.cc/62LS-YS3W>].

70. *Id.*

Effects of sexual harassment include shame and embarrassment, stemming from a woman's fear of what her coworkers will think of her, what her children will say, and how her husband will react. Women—like Leticia S. and Leticia Z.—also experience shame and embarrassment within themselves, resulting in them carrying the heavy burden alone.<sup>71</sup>

Underreporting is another major issue of sexual harassment. In a telephone poll of 782 U.S. workers, 62% took no action to report their sexual harassment.<sup>72</sup> Furthermore, even though there are an estimated 5,000 to 17,000 sexual harassment incidents in the workplace, only 4,312 sexual harassment claims were filed with the California Department of Fair Enforcement and Housing in 2014.<sup>73</sup> In 2017, the EEOC received 12,428 sex-based harassment complaints nationwide.<sup>74</sup> A study conducted by the EEOC found that “common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget, or endure the behavior (44% to 70%).”<sup>75</sup> Latinas were less likely to report sexual harassment than other ethnicities; only 6.6% of Latinas who were sexually victimized reported it to the police.<sup>76</sup> Furthermore, underreporting is even higher with undocumented workers, likely due to the fact that if they report harassment, retaliation could result in their deportation.<sup>77</sup> Of the women who have reported harassment, almost half experienced retaliation from their harasser or employer.<sup>78</sup> This leaves sexually harassed janitorial women in a more vulnerable position because the retaliation generally results in their loss of employment, leaving them unable to provide for their families.

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71. *Frontline*, *supra* note 10.

72. Linda Chalat, *Spud Seller Supers Think They Are Studs*, LEGAL EXAM'R (Oct. 5, 2010), <https://www.legalexaminer.com/workplace/spud-seller-supers-think-they-are-studs/> [<https://perma.cc/9ESN-UHAK>].

73. *Written Testimony of Patti Perez Shareholder at Ogletree Deakins and Member California Fair Employment and Housing Council*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/written-testimony-patti-perez-shareholder-ogletree-deakins-and-member-california-fair-employment> [<https://perma.cc/4SRZ-9X23>]; CHEN, *supra* note 25, at 4.

74. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) [<https://perma.cc/GW7J-WAM4>].

75. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_ftnref57](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref57) [<https://perma.cc/Q9XX-3LFU>].

76. CHEN, *supra* note 25, at 6.

77. *Id.*

78. *Id.* at 7.

Furthermore, women who do file sexual harassment claims face limited protections through either a civil lawsuit for monetary compensation or a criminal prosecution, because it is often impossible to win these cases due to the high standard of proof required.<sup>79</sup> Hurdles in proving sexual harassment are caused by insufficient workplace procedures and security measures; this results in women working alone with a male without cameras or protection.<sup>80</sup> Employers have little incentive to enforce sexual harassment policies in general. As economist Joni Hersch notes in her research, companies are not incentivized to mitigate the risk of workplace harassment because mitigation procedures are less readily discoverable than other issues, such as workplace deaths.<sup>81</sup> For example, after a \$5.8 million lawsuit, ABM continues to get sued by many women who have suffered from harassment.<sup>82</sup> Even when the EEOC brings a lawsuit against a janitorial company, like ABM, policies and procedures are still not corrected to deter and minimize sexual harassment.<sup>83</sup>

Many women who wish to file a sexual harassment claim wait too long and are barred by the statute of limitations.<sup>84</sup> This reflects the fact that women are not informed about the type of protections and remedies they may have. The protections that are in place are further burdened by the limited resources and understaffing of agencies with whom sexual harassment claims are filed. Further, the various requirements necessary to file a claim—such as the statute of limitations or the number of employees within the company<sup>85</sup>—create additional

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79. *See id.*

80. *Id.* at 6.

81. Joni Hersch, *Can the Media Solve the Problem of Sexual Harassment*, GEO. J. INT'L AFFS. (Mar. 1, 2018), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/3/1/can-the-media-solve-the-problem-of-sexual-harassment> [https://perma.cc/CB5P-BBTY].

82. U.S. EEOC v. ABM Indus., Inc., No. 1:07-CV-01428 LJOJLT, 2010 WL 1267346 (E.D. Cal. Mar. 31, 2010); Press Release, U.S. Equal Emp. Opportunity Commission, ABM Industries Settles EEOC Sexual Harassment Suit for \$5.8 Million (Sept. 2, 2010), <https://www.eeoc.gov/newsroom/abm-industries-settles-eeoc-sexual-harassment-suit-58-million> [https://perma.cc/2RGV-KGAY].

83. *Frontline*, *supra* note 10.

84. *Id.*

85. ALLARDYCE RESOURCES LLC, CALIFORNIA FEHA & FEHC AND FEDERAL ADA COMPARISON CHART (2008), <http://www.arhumanresources.com/wp-content/uploads/2014/06/FEHAFEHCtoADAComparisonChart10-14-08.pdf> [https://perma.cc/J9BD-ADTH]. FEHA applies to public and private employers, and prohibits harassment against employees based on a protected category. It is illegal for employers of five or more employees to discriminate or retaliate against employees. *Employment Discrimination*, CAL. DEP'T FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/employment/> [https://perma.cc/4ZCU-YGCE].

barriers for women who wish to report sexual harassment in the workplace.

## **B. The Reasons Why Sexual Harassment Incidents Are Higher in the Nightshift**

Several factors explain why women working the nightshift frequently get assaulted, including: (1) sex, race, immigration status, and culture; (2) underreporting in the workplace; and (3) lack of policies and procedures in the workplace. These factors, in addition to women working alone during the nightshift, put women's safety at a greater risk.

### **1. Sex, Race, Immigration Status, and Culture**

Sex, race, immigration status, and culture play a significant role in incidences of sexual harassment for both the harasser and victim. Women lack power in the workplace, especially those in male dominated fields such as the janitorial business.<sup>86</sup> There are 1.73 million males and 827,000 females who work as janitors.<sup>87</sup> Despite the fact that over forty percent of janitors are women, supervisory roles within the janitorial industry are highly male-dominated.<sup>88</sup> In other male dominated industries, like mine workers, female workers face similar struggles.<sup>89</sup>

Race is another factor contributing to increased sexual harassment of janitors in the workplace. Harassers are often in a race-privileged position, and view women of color as less powerful, less likely to complain, and less likely to be believed when reporting harassment.<sup>90</sup> "From the perspective of the women, attitudes in their community and lessons learned in their culture may make it more difficult for

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86. See CHEN, *supra* note 25, at 17.

87. *Janitors & Building Cleaners*, DATA USA, <https://datausa.io/profile/soc/37201X/> [<https://perma.cc/WVV6-PPUY>].

88. Emily Baxter, *How the Gender Wage Gap Differs by Occupation*, CTR. FOR AM. PROGRESS (Apr. 14, 2015, 7:00 AM), [www.americanprogress.org/issues/women/news/2015/04/14/110959/how-the-gender-wage-gap-differs-by-occupation/](http://www.americanprogress.org/issues/women/news/2015/04/14/110959/how-the-gender-wage-gap-differs-by-occupation/) [<https://perma.cc/43FV-KRMH>]; CHEN, *supra* note 25, at 15.

89. Ruben J. Garcia, *From North to South Country: Race, Gender, Immigration, and the Role of Unions in the Sanitized Workplace*, 29 T. JEFFERSON L. REV. 55 (2006); The film, *North Country* explains the struggle females have in male-dominated environments because the men resent women for working alongside them. In that case study, female mine workers filed the first class action sexual harassment case. Like mine workers, female janitors are in a male-dominated environment, as most supervisors and foreman are male and most women are cleaners. *NORTH COUNTRY* (Participant Productions 2005).

90. See Ontiveros, *infra* note 96, at 819, 824–25.

them to respond forcefully to the discrimination.”<sup>91</sup> Women of color are not privileged by their race or gender, unlike their white or male counterparts.<sup>92</sup> Thus, attacking a woman of color is thought of as less severe than attacking a white woman.<sup>93</sup> For these reasons, being a woman of color increases the chance of getting sexually attacked at work.<sup>94</sup>

Not only are women of color already at risk for being harassed at higher rates than white women, they also have unequal bargaining power because they fear speaking out will result in losing their job.<sup>95</sup> Women underreporting sexual harassment further increases the likelihood of continued sexual harassment.

Additionally, a woman’s undocumented status allows a harasser to blackmail their victim. Women of color are already often perceived as accessible for sexual use with few consequences to an aggressor, and undocumented status gives a harasser even *more* power.<sup>96</sup> Harassers use their victim’s lack of legal status to live or work in the United States as a “tool” to threaten their victims, as seen in the cases of Leticia Z. and Erika. Immigrant status promotes “rape by duress,” where immigrant women do not report their rape because of fear of deportation and lack of knowledge of their constitutional rights to redress in a court of law.<sup>97</sup>

Culture also influences how a woman will react to her aggressor.<sup>98</sup> Some sexually harassed women of color find it more difficult to respond to sexual violations against them.<sup>99</sup> This is because of lessons learned in their cultures and communities.<sup>100</sup> For example, a woman of color may not report the harassment she experiences because she has witnessed individuals question the credibility of another assaulted

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91. *Id.* at 818.

92. *Id.*

93. *Id.* at 818–19.

94. *Id.*

95. See generally Soto, *supra* note 2 (giving an example of a woman of color that did not speak out about sexual harassment from a coworker because she was fearful of losing her job).

96. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

97. *Id.* at 822.

98. *Id.* at 821.

99. *Id.*

100. *Id.*

woman of color.<sup>101</sup> These women may also not choose to report because they are taught to believe they need to obey men.<sup>102</sup>

Additionally, some women of color are raised to follow traditional cultural norms.<sup>103</sup> For example, some Latina women are raised with the “macho culture,” and some Asian women are raised in a system which encourages submissiveness and passivity.<sup>104</sup> Also, many women feel they are the ones to blame for being sexually assaulted. For example, a Mexican victim of harassment said she did not report her harassment because “a woman who is raped in Mexico is the one at fault, maybe because her parents didn’t watch her.”<sup>105</sup> In addition, African Americans are often reluctant to report problems and are discouraged from seeking help from law enforcement.<sup>106</sup> For example, issues within African American communities are often not reported to the police, but instead, are handled within the community due to experiences with police brutality.<sup>107</sup>

## 2. Underreporting in the Workplace

Sexual harassment is perpetuated by underreporting in the workplace. Women working during the nightshift often do not report sexual harassment.<sup>108</sup> This can be due to lack of support, despair, and shame.<sup>109</sup> Also, women janitorial workers are rarely believed when they report to supervisors or human resources—when they are believed, there is often insufficient evidence to prosecute their attackers.<sup>110</sup> This may further incentivize women not to report harassment.

The structures in the nightshift also contributes to underreporting. Layers of contracting and subcontracting create less accountability for contracting employers, where there is often blame shifting between the contracting parties.<sup>111</sup> In these circumstances, employees do not know which contractor to report their harassment to, resulting

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101. *Id.* at 824–25.

102. *Id.* at 821.

103. *Id.*

104. *Id.*

105. Ontiveros, *supra* note 96, at 822.

106. NAT’L PUB. RADIO ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS (2017), <https://www.npr.org/assets/img/2017/10/23/discrimination-poll-african-americans.pdf> [<https://perma.cc/4RNT-WL3R>].

107. *Id.*

108. CHEN, *supra* note 25, at 4.

109. *Id.*

110. *Id.*

111. *Id.* at 6.

in victims not reporting at all.<sup>112</sup> Finally, women in the janitorial industry often do not report their sexual harassment because they are not trained on how to properly report it—they do not know when, how, or where to even start.<sup>113</sup> Underreporting is also often amplified by insufficient policies and procedures.

### 3. Lack of Policies and Procedures in the Workplace

Many janitorial companies, like ABM, are multibillion-dollar companies that do not enforce the policies and procedures that serve to help report sexual harassment. Even though proper policies and procedures may be in place, they are not enforced by human resources and management.<sup>114</sup> Lack of enforcement results in many women not knowing the procedures they're required to follow to report abuse, or the resources available to them when they are harassed and want to report.<sup>115</sup> Moreover, many women who work as janitors during the nightshift are monolingual, and language barriers prevent them from understanding their rights, bringing a complaint in the workplace, or finding justice via the legal system.<sup>116</sup>

The structures in the nightshifts also contributes to harassment, which if addressed, could significantly reduce the number of women sexually harassed by their male counterparts. First, women often work alone during the nightshift with a male supervisor. As Leticia S. explained in her story, she was alone with her harasser on the night she was raped, so nobody heard her screams.<sup>117</sup> Lack of accountability created by contracting and subcontracting often results in supervisors, foreman, and employees of a janitorial company being improperly trained.<sup>118</sup> Often times in low-wage industries, proper human resource procedures do not exist for training employees.<sup>119</sup> Even when policies and procedures for reporting sexual harassment are in place, women are not properly trained on these procedures, thus rendering policies unutilized.<sup>120</sup> Further, even when women report sexual har-

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112. *Id.*

113. *Id.*

114. *Frontline*, *supra* note 10.

115. *Id.*

116. *Id.*; Allen Smith, *Protect Workers Whose Jobs Make Them Vulnerable to Harassment*, SOC'Y FOR HUM. RES. MGMT. (Feb. 8, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/vulnerable-to-harassment.aspx> [<https://perma.cc/W4BR-RZGY>].

117. *Frontline*, *supra* note 10.

118. CHEN, *supra* note 25, at 6.

119. *Id.*

120. *Id.*

assessment, they may not be taken seriously; thus, proper investigations are not conducted.<sup>121</sup>

Instead of implementing and utilizing proper procedures and policies, large companies often take their chances with litigation. Companies such as ABM avoid reasonable care and prevention methods, leading to lawsuits by women who are fed up and want to prevent further sexual harassment to other women.<sup>122</sup> There have been sexual harassment cases filed against ABM, and similar companies, primarily by women who have been assaulted by their supervisors in the workplace.<sup>123</sup> These companies typically respond by firing the harasser, and occasionally the victim will be awarded monetary compensation.<sup>124</sup> In a recent case against ABM, twenty-one women, represented by the EEOC, filed a lawsuit against ABM for sexual harassment by fourteen men.<sup>125</sup> The court found in favor of the plaintiff-women and awarded them \$5.8 million dollars.<sup>126</sup> Even though these women were successful in this lawsuit, other women who have suffered sexual harassment have not been.<sup>127</sup> Many are unable to prevail against big janitorial companies due to inadequate investigation procedures or sufficient workplace security.<sup>128</sup> For example, Leticia Z. pursued legal help when she was sexually harassed in her workplace, but was unable to persevere because the District Attorney assigned to her case did not believe there was enough physical evidence due to the lack of workplace security.<sup>129</sup>

## II. The Property Services Workers Protection Act (A.B. 1978)

In 2016, as a response to the exponential growth of sexual assaults on nighttime janitorial workers, A.B. 1978 passed in California.<sup>130</sup> Prior to the passage of A.B. 1978, there were limited resources available to victims of sexual harassment in the workplace. Those re-

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121. *Id.*

122. *Id.*

123. U.S. EEOC v. ABM Indus., No. 1:07-CV-01428 LJOJLT, 2010 WL 1267346 (E.D. Cal. Mar. 31, 2010); Bernice Young, *Nation's Largest Janitorial Company Faces New Allegations of Rape*, FRONTLINE (Jan. 16, 2018), <https://www.pbs.org/wgbh/frontline/article/nations-largest-janitorial-company-faces-new-allegations-of-rape/> [https://perma.cc/N4Q2-R8SL].

124. CHEN, *supra* note 25, at 6.

125. Press Release, *supra* note 82.

126. *Id.*

127. *Id.*; *Frontline*, *supra* note 10.

128. Press Release, *supra* note 82; *Frontline*, *supra* note 10.

129. *Frontline*, *supra* note 10.

130. Assemb. B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

sources came from state and federal agencies, like the Department of Fair Employment and Housing (“DFEH”) and the EEOC.

#### A. Protections Available Prior to A.B. 1978

Janitorial unions tried to address the growing issue of sexual harassment by negotiating contracts on behalf of janitors with their employers.<sup>131</sup> Contract terms included the prohibition of intimate relations between supervisors and janitors and changing sexual harassment investigations that janitorial companies conduct.<sup>132</sup> However, this approach has limited effectiveness in deterring sexual harassment because prohibitions and investigation guidelines often go unfulfilled, as evidenced by the ongoing sexual harassment janitorial women face.<sup>133</sup>

California Department of Industrial Relations’ (“DIR”) mission includes ensuring fair pay and economic justice by protecting workers from retaliation, including retaliation from reporting sexual harassment—although that is just one of forty-five labor laws that the Labor Commissioner’s Office enforces.<sup>134</sup> One of the agencies within the DIR is the Department of Labor and Standards Enforcement, which primarily deals with wage theft claims as well as retaliation claims.<sup>135</sup> Access to the Department of Labor and Standards Enforcement’s resources is essential, as many sexual harassment victims experience some form of retaliation when they report an incident.

The DFEH is a California state agency primarily dealing with discrimination complaints, including sexual harassment claims. DFEH’s mission is to protect workers from unlawful discrimination and retaliation as a result of a sexual harassment complaint. DFEH has a one year statute of limitations to bring a claim.<sup>136</sup> The DFEH offers an individual two options: (1) obtain a right to sue and hire a private attorney; or (2) pursue relief through the DFEH by utilizing their investigation process.<sup>137</sup> When a complaint is filed with DFEH, DFEH

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131. Yeung, *supra* note 45, at 3.

132. *Id.*

133. *Frontline*, *supra* note 10.

134. *Labor Commissioner’s Office*, DEP’T INDUS. RELS., <https://www.dir.ca.gov/dlse/dlse.html> [<https://perma.cc/3TNP-5TDX>]; *Retaliation Complaint Investigation Unit (RCI)*, DEP’T INDUS. RELS., <https://www.dir.ca.gov/dlse/dlseRetaliation.html> [<https://perma.cc/6SPA-UYDZ>]; *Laws that Prohibit Retaliation and Discrimination*, DEP’T INDUS. RELS., <https://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm> [<https://perma.cc/5WE3-92MH>].

135. *Id.*

136. *Complaint Process*, CAL. DEP’T FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/ComplaintProcess/> [<https://perma.cc/24HS-RNPH>].

137. *Id.*

conducts an investigation. If a claim is meritorious, it is sent to dispute resolution, which could result in a settlement or a judgment by the court.<sup>138</sup> However, DFEH's investigatory process and resources have not been as effective as they could be because women are often uninformed about this form of relief, and thus do not file a complaint with the DFEH.<sup>139</sup> As a result, women settle for complaining to their employer and not seeking legal help through DFEH.<sup>140</sup>

At the federal level, the EEOC enforces Title VII of the Civil Rights Act of 1964. Title VII's statute of limitations differs from that of the DFEH; victims have only forty five days to report the alleged harassment, and an investigation must be filed within 180 days after the claim is filed.<sup>141</sup> Before filing a formal complaint, the aggrieved employee must seek pre-complaint counseling, and contact the EEOC counselor within forty-five days of the alleged discrimination.<sup>142</sup> If the employee fails to meet the statute of limitations, extensions can be made only if the victim shows that they: (1) were not notified or were unaware of the time limits; (2) "did not and reasonably should not have known that the discriminatory matter occurred;" or (3) "despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits."<sup>143</sup> Then, if a matter is not resolved within thirty days, a counselor must inform the aggrieved employee that they have fifteen days from receipt of notice to file a formal discrimination complaint.<sup>144</sup> After filing a formal complaint, an investigator is assigned and has 180 days to complete the investigation.<sup>145</sup>

Another resource available to aggrieved employees who are undocumented is A.B. 524, which amends section 519 of the penal code.<sup>146</sup> The law provides that threatening to report an individual's immigration status or suspected immigration status or their relative's immigration status may induce fear sufficient to constitute extortion, which is a punishable crime.<sup>147</sup> The law was amended to protect immi-

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138. *Id.*

139. CHEN, *supra* note 25, at 1, 4.

140. *Id.*

141. *Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm> [https://perma.cc/5YV4-ZFWM].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Assem. B. 524, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

147. *Id.*

grant individuals.<sup>148</sup> However, even with this amendment, almost half of the women who complain have their immigration status used against them as a threat, and victims continue to be sexually harassed or retaliated against.<sup>149</sup>

Finally, California's blanket law, section 11023 of Title 2 of California's Code of Regulations, Harassment and Discrimination Prevention and Correction, provides that "[e]mployers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct."<sup>150</sup> The regulation provides guidelines for what employers must do in order to comply, including distributing DFEH's brochure on sexual harassment and developing a written harassment, and implementing a discrimination and retaliation prevention policy.<sup>151</sup> Further, any employer with a workforce that "contains more than 10 percent of persons who speak a language other than English" must have a translated policy.<sup>152</sup> Even though employers are supposed to comply with these regulations, many do not. Consequently, these employers are sued as sexual harassment claims from their employees grow.

## B. Protections Offered by A.B. 1978

A.B. 1978 was initiated by Ya Basta Coalition, co-sponsored by Equal Rights Advocate and SIEU, and introduced by assemblywoman Lorena Gonzalez in 2016 in response to the film "Rape on the Nightshift."<sup>153</sup> Two days before the bill was passed, janitorial women and union leaders protested in Sacramento, showing support for the legislation.<sup>154</sup> A.B. 1978 was enacted to protect property service workers from wage theft and sexual harassment. It protects the public interest by ensuring employers compete primarily on the basis of quality, efficiency, and innovation—not through "a race to the bottom that perpetuates substandard working conditions and lack of compliance with labor standards laws."<sup>155</sup> The rising number of women who are sexu-

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148. *Id.*

149. CHEN, *supra* note 25, at 7.

150. CAL. CODE REGS. tit. 2, § 11023 (2013).

151. *Id.*

152. *Id.*

153. *Frontline*, *supra* note 10; Yeung, *supra* note 45.

154. *Id.*

155. ROGER HERNÁNDEZ, ASSEMBLY COMM. ON LABOR & EMP'T, BILL ANALYSIS AB 1978 (2016), [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_1951-2000/ab\\_1978\\_cfa\\_2016\\_0418\\_143554\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1951-2000/ab_1978_cfa_2016_0418_143554_asm_comm.html) [<https://perma.cc/JJ2E-TZKA>].

ally harassed in the janitorial field while working the night shift evidenced the need for these specialized protections.

A.B. 1978 addresses “covered workers,” which includes “any individual working, whether as an employee, independent contractor or a franchisee, as a janitor.”<sup>156</sup> The bill provides a solution for the popular blame shifting between contractors and subcontractors because employers are defined 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.”<sup>157</sup> All employers are required to comply with registration requirements.<sup>158</sup> The registration requires a \$500 initial nonrefundable registration fee that is paid to the DLSE, and an additional \$500 annual fee on the anniversary of the initial registration date.<sup>159</sup>

As of July 1, 2018, the bill also requires all employers covered under this law to provide workers a copy of the DFEH pamphlet on sexual harassment until proper training is implemented.<sup>160</sup> Additionally, section 1429 of Part I requires an employer to complete the sexual violence and harassment prevention training requirements prescribed by the division.<sup>161</sup> The DLSE also requires employers to perform a “biennial in-person sexual violence and harassment prevention training requirement for employees and employers,” by January 1, 2019.<sup>162</sup>

Representatives from the Department of Occupational Safety and Health, DFEH, and DLSE make up an advisory committee that develops training programs on sexual harassment prevention.<sup>163</sup> Other representatives in the committee include “certified collective bargaining agent[s] that represent[s] janitorial workers, employers, labor management groups in the janitorial industry, sexual assault victims advocacy groups, and other related subject matter experts.”<sup>164</sup> If employers do not comply by the requirements under section 1429, employers will be prohibited from conducting regular business activities and their license will be put on hold.<sup>165</sup>

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156. *Id.*

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

### III. Response to A.B. 1978

A.B. 1978 focuses on consequences to employers who do not comply with sexual harassment compliance trainings. The law focuses on training and incentivizing training, while providing a blanket approach to all contractors and subcontractors.<sup>166</sup> Thus, it is imperative that the training be designed collectively. A.B. 1978 is progressive and provides a punitive approach to employers who do not use their policies and procedures for training. However, the bill bypasses other necessary remedies to protect women working the nightshift. The legislature could require other remedies, such as requiring the employer to provide self-defense training, reporting and responding to complaints, informing women on statute of limitations, and providing an easier vehicle for communicating these resources through pamphlets. This section begins by discussing ways in which the training can be designed, and then discusses other additions that should be included.

#### A. Training

In the janitorial industry, training is used as a preventative measure for sexual harassment. However, there is a lack of training and a rise in sexual harassment.<sup>167</sup> A.B. 1978 can be very helpful to addressing these issues if used in conjunction with trainings in: self-defense, reporting sexual harassment, responding to complaints, and informing employees about the statute of limitations. These trainings should be communicated through transparent methods in order to deter sexual harassment at the workplace. If implemented correctly, trainings would help to establish a safe working environment for many women in the janitorial industry, especially for those who work at nighttime.

##### 1. Self-Defense

Some cities and advocacy groups have already implemented self-defense training for service workers who are vulnerable at the job-site.<sup>168</sup> These training courses teach women how to protect themselves by physically fighting back if they are attacked.<sup>169</sup> This is a good preventive method for women if they are attacked while working during

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166. *Id.*

167. CHEN, *supra* note 25, at 1, 10.

168. Sasha Khokha, *Before #MeToo Women Janitors Organized to Fight Workplace Harassment*, WORLD (Jan. 29, 2018, 4:45 PM), <https://www.pri.org/stories/2018-01-29/metoo-women-janitors-organized-fight-workplace-harassment> [<https://perma.cc/N2X8-C3GX>].

169. *Id.*

the nightshift and there is no one to hear or help them. Women involved in these classes not only learn how to defend themselves against aggressors, they also build self-confidence and become empowered as leaders who help other women.<sup>170</sup>

## 2. Reporting Sexual Harassment

In addition to self-defense courses, it is important to train all employees on how to report sexual harassment. This is especially important as underreporting is a major issue—because victims do not know how to report—and improper training leads to more underreporting. Underreporting also increases incidents of sexual harassment because it sends harassers the message that there will be no consequences for their actions.<sup>171</sup> When women do not know where to report sexual harassment they often go to their immediate supervisor. As many of the women in “Rape on the Nightshift” experienced, many supervisors do not believe women and, as such, do nothing in response to their report.<sup>172</sup> Women should be trained to report sexual harassment to their employer’s human resources department, state agencies like the DFEH, federal agencies like the EEOC, the police, and even be provided information on how to seek out private attorneys.

All employees should understand how to report sexual harassment that is happening to another employee. Supervisors and coworkers should use the “loved ones litmus test” to determine if behavior they are observing should be reported. The test considers whether they would be uncomfortable with the act if it were their child being subjected to that behavior.<sup>173</sup> If they are uncomfortable with the behavior, then they are told it should be reported to human resources so that appropriate measures can be taken. This kind of test encourages employees to report sexual harassment when they know that another employee has suffered from sexual harassment but has not reported it.<sup>174</sup>

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170. *Id.*

171. *Frontline*, *supra* note 10.

172. *Id.*

173. *Id.*

174. See Dana Wilkie, *When HR Gets It Wrong: Training that Doesn't Work*, SOC'Y FOR HUM. RES. MGMT. (July 19, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/hr-gets-it-wrong-3-.aspx> [<https://perma.cc/NWY9-TTD5>].

### 3. Responding to Complaints

Sexual harassment training should be provided to employees, managers, supervisors, and co-workers upon hiring. Further, additional training should be mandatory and strictly implemented following any sexual harassment complaint. Training all employees—regardless of their position—is important because some women informally confide in a coworker instead of reporting assault to human resources, their managers, or supervisors due to fear or embarrassment.<sup>175</sup> Proper training could result in the coworker advising a sexual harassment victim of the type of help that is available to them, or even reporting the assault on behalf of the victim.

Confidentiality is also a big concern for victims when they complain, as many women feel shame and embarrassment. Women should learn in trainings that whatever they say while reporting will be confidential, regardless of who they report it to. This means that the informed supervisor will not tell co-workers who the victim is. However, they may tell human resources in order to investigate and resolve the issue. Confidentiality agreements such as this could help women who are harassed by family friends—especially when they are afraid to speak out because their family may find out and blame them.

### 4. Statute of Limitations

Women should be trained on the statute of limitations to ensure that if they want to bring a lawsuit they are able to do so before the statute of limitations has passed.<sup>176</sup> Women must be told that they cannot wait two years before complaining about sexual harassment because they will lose their right to sue and be unlikely to receive any form of relief.

### 5. Pamphlets

Although A.B. 1978 requires that employees receive DFEH pamphlets, the bill does not completely address enforcement from DLSE to ensure pamphlet distribution. Furthermore, the bill does not state whether distributing DFEH pamphlets will stop once the training is implemented in 2020.<sup>177</sup> It is important to train employees while also giving them easy to understand pamphlets. Even if an employee

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175. *See generally id.* (addressing how these training programs could be properly implemented to be the most effective).

176. CHEN, *supra* note 25, at 10.

177. Assemb. B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

speaks English, it is likely that they will not read a verbose pamphlet because their schedules may already be busy. Furthermore, even though California regulation, 2 CCR § 11023, requires pamphlets to be given to employees, pamphlets alone are not effective in deterring sexual harassment.<sup>178</sup> This likely means that pamphlets are either not being distributed or employees are not reading them. Thus, greater enforcement measures must be implemented to increase effectiveness. Pamphlets are a good starting point; they can be successful in conjunction with training and enforcement of their distribution.<sup>179</sup> Lastly, failure to comply with training or distribution of pamphlets should result in penalties beyond suspending the company's license, such as putting the company under a performance improvement review for a certain period of time.

## B. Necessary Additions

Additional measures must be implemented to prevent sexual harassment. These necessary additions may be solutions for stopping underreporting in the workplace, threatening of undocumented status, and supporting victims in pursuing lawsuits.

### 1. U-Visa

The first addition is to provide undocumented women with the knowledge and tools for obtaining a U-Visa. A U-Visa would protect women from deportation and empower them to report their sexual harassment. U-Visas are given to "victims of certain crimes who have suffered mental or physical abuse."<sup>180</sup> They are "helpful to law enforcement or government officials in the investigation or prosecution of criminal activity."<sup>181</sup> The primary intent of U-Visa legislation is to prosecute cases of sexual assault while protecting victims of crime.<sup>182</sup>

Sexual harassment is a prevalent issue in the janitorial industry and in order to decrease assaults, aggressors must face criminal prosecution. Criminal liability could deter sexual harassment since often the only consequence to a harasser is losing or having to quit their

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178. *Id.*; CAL. CODE REGS. 2, § 11023 (2013).

179. Brendan L. Smith, *What It Really Takes to Stop Sexual Harassment*, 49 AM. PSYCHOL. ASS'N 36 (2018).

180. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#U%20Nonimmigrant%20Eligibility> [<https://perma.cc/6PGJ-XYD3>].

181. *Id.*

182. *Id.*

job. If a harasser loses their job without criminal consequences, they can get a new job where other employees may be subjected to the same harassment. U-Visas safeguard victims, allowing them to report sexual harassment without the threat of being deported. Furthermore, if a company promotes and informs employees of U-Visas and potential punishments, aggressors are less likely to initiate future sexual assaults for fear of criminal prosecution.<sup>183</sup>

Under a U-Visa, qualifying criminal activity includes sexual assault, rape, and sexual exploitation.<sup>184</sup> The legislature should suggest the use of U-Visas similar to how they have suggested other remedies, and require their compliance under A.B. 1978.<sup>185</sup> Employers should be required to inform employees who are victims of sexual harassment about U-Visas. Additionally, an employee must be informed—whether they are documented or undocumented—that they have the option to file a police report documenting their sexual harassment, as well as be told what a police report means for obtaining a U-Visa.

## 2. Human Resources

Human resources should take additional measures to deter, prevent, and appropriately handle sexual harassment. Human resources should administer targeted training to workers on anti-harassment policies and procedures, in addition to completing periodic checks to ensure all accusations and concerns are adequately addressed and reported.<sup>186</sup> Sexual harassment could be reported to human resources by an individual alone or by another co-worker. Allowing someone who is not the victim to report to human resources is essential when, for example, the victim is monolingual or illiterate. If translators are provided, it is important to ensure that a victim's report is accurate and does not get lost or misconstrued through language translations. Training should also be in other languages and in different forms such as in the form of comic books, demonstrations, and pictures so that all workers can understand the sexual harassment procedures.

Human resources should also alter procedures that allow women to work alone at night in dangerous conditions. Women can defend themselves in some situations, however, if they are alone, their aggres-

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183. CHEN, *supra* note 25, at 12–13.

184. *Victims of Criminal Activity*, *supra* note 180.

185. See *generally* Assemb. B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016) (requiring compliance with U-Visas could stop these criminal activities because employees could lose their business registrations if caught).

186. Smith, *supra* note 116.

sors may become violent, as explained by the women in “Rape on the Nightshift.”<sup>187</sup> Further, when women work alone—and with no cameras—it is the victim’s word against a harasser’s word, with no other evidence.<sup>188</sup> Requiring that all women work with a partner at night will not only allow employees to help defend each other, it also provides corroboration of statements in the chance that a sexual harassment still occurs.<sup>189</sup>

Human resources, in a sense, is the backbone of a company. Thus, it must take preventative measures and properly conduct investigations. It is also human resources’ responsibility to make sure that employees, especially managers and supervisors who have power to hire and fire other employees, are following procedures.<sup>190</sup> Ana Parks, the representing attorney for the EEOC, states, “we have seen this time and time again, where there are certain complaints received by certain segments of their workforce [that] just [do not] matter. It’s not that important. It is a cost of doing business.”<sup>191</sup>

Human resources need to respond to sexual harassment complaints immediately. Responses can be guided by EEOC guidelines on Vicarious Employer Liability for Unlawful Harassment by Supervisors.<sup>192</sup> These guidelines set forth the minimum elements for anti-harassment policies and complaint procedures.<sup>193</sup> They state that a policy should contain:

a clear explanation of prohibited conduct; assurance that employees who make complaints . . . will be protected against retaliation; a clearly described complaint process . . . ; assurance . . . [of] confidentiality . . . ; a . . . prompt, though, and impartial investigation; and assurance that the employers will take . . . corrective action when it determines the harassment has occurred.<sup>194</sup>

If an employer is forced to follow these minimum guidelines, issues preventing women from reporting would decrease. These guidelines must be strictly enforced in order for them to be effective. They

187. *Frontline*, *supra* note 10.

188. *Id.*

189. *End Rape on the Nightshift*, SERV. EMPS. INT’L UNION, <https://www.seiu-usww.org/end-rape-on-the-nightshift/> [<https://perma.cc/FYJ8-JKER>].

190. CHEN, *supra* note 25, at 17.

191. *Id.* at 7.

192. *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 18, 1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors> [<https://perma.cc/EN6V-SE2H>].

193. AMY OPPENHEIMER & CRAIG PRATT, *INVESTIGATING WORKPLACE HARASSMENT: HOW TO BE FAIR, THOROUGH, AND LEGAL* 32 (Sharon Lambertson ed., 2003).

194. *Id.*

should be included in legislation, and most importantly, enforced the same way that wage and hour violations are enforced—with the consequence of revocation of business licenses if not followed properly.

### 3. Background Checks

Employers should perform background checks on all potential employees. Since harassment is a huge issue amongst nighttime janitorial workers, companies should check all employees' criminal activity involving sexual misconduct. This could prevent cases like Erika's, where her harasser was a registered sex offender but ABM did not check his background.<sup>195</sup> If ABM required background checks, they would have been aware of her harasser's prior conviction, and ensured that he was not hired—or at least not left alone while working with women. Under California Evidence Code §1108, past sexual assaults are admissible against a criminal defendant to prove that they have a propensity to commit sexual assault crimes; the rationale is to protect victims.<sup>196</sup> If courts in California consider past sexual assaults of a defendant to prove propensity, employers should also consider such criminal activities in their hiring processes to protect their employees.

### 4. Agency Coordination

Agencies in addition to DLSE and DIR should also play a role in deterring sexual harassment as in A.B. 1978. Although DFEH plays a role in the advisory committee, their only role is in determining training protocols and standards; it is the Labor Commissioner's role to enforce any violations.<sup>197</sup> The Labor Commissioner receives money from fees charged to employers to enforce both sexual harassment as well as wage and hour violations.<sup>198</sup> The Labor Commissioner's main focus is on wage theft and preventing retaliation.<sup>199</sup> Thus, adding sexual harassment enforcement is an additional strain, and any additional money provided to it would also be used to enforce wage and hour violations. Therefore, the sexual harassment component of the legislature should primarily be overseen by DFEH, allowing it to enforce such claims and recommended trainings.

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195. *Frontline*, *supra* note 10.

196. CAL. EVID. CODE §1108 (West 2019).

197. Assemb. B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

198. *Id.*

199. *Labor Commissioners Office*, *supra* note 134; *Retaliation Complaint Investigation Unit (RCI)*, *supra* note 134.

## Conclusion

The legislature attempted to remedy the issue of sexual harassment to women in nightshifts by enacting A.B. 1978. Although training and punishment for non-compliance may help, they are insufficient remedies for rectifying the underlying issues of sexual harassment. In order to truly rectify such issues, the law must not only focus on training, it must also focus on incentivizing reporting and better protecting women working at night. It must seek to more aggressively enforce training and impose necessary additions such as access to U-Visas, better human resources, implementing background checks, and better agency coordination.

Simply providing training does not stop the underreporting of sexual harassment because there are underlying issues of race, sex, culture, and undocumented status that must be addressed. Stricter measures to address these underlying issues—such as implementing trainings, empowering and informing women, and creating new policies—may reduce sexual harassment in the workplace. Implementing new policies and procedures to deal with workplace harassment in the janitorial industry could eventually reduce the number of victims that fall into the traps of perpetrators.

Leticia S., Leticia Z., and Erika have undergone traumatic experiences due to lack of protocols within their employment. However, they are now trailblazers shedding light on this issue. They are finally receiving the attention they deserve and are being heard by people who once did not want to hear them. A.B. 1978 must continue to expand and keep security measures in place to protect women from being harassed during the nightshift.