



**Buchanan
Ingersoll &
Rooney PC**

#metoo...

Yes! This means you too!

**PACAH 2018 Fall Conference
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#metoo? Really? No...not us!!



Why Are We Here Today?



- Recap recent newsworthy events and how they have impacted employers.
- Increase your understanding of what constitutes sexual and other forms of workplace harassment.
- Review state and federal laws that come into play.
- Discuss “best practices” for ensuring that your workplace is free from harassment.

Why now? #MeToo Movement



Amazon TV Producer Goes Public With Harassment Claim Against Top Exec Roy Price (Exclusive)

2:25 PM PDT 10/12/2017 by Kim Masters



Russell Simmons steps down after sexual assault allegation

CNN Money

1 hour ago



Onslaught of #MeToo Allegations



- ❑ Movement began in October 2017 with allegations of sexual misconduct against Harvey Weinstein
- ❑ Since then, dozens of prominent figures in television, film, politics, music, sports and beyond have faced similar accusations

Effects of the #MeToo Movement

- ❑ A “sea change moment”: individuals who feel they are being harassed and bystanders are increasingly coming forward
- ❑ Alleged harassers and organizations accused of allowing harassment are being condemned in the court of public opinion



“Harassment” Has Become a Part of Our National Conversation

'Weinstein effect' is boosting inquiries about workplace harassment

Heidi M. Przybyla, USA TODAY Published 5:15 p.m. ET Nov. 14, 2017 | Updated 9:46 p.m. ET Nov. 14, 2017

WAMU 88.5 news arts & life music programs shop

NATIONAL

When It Comes To Sexual Harassment Claims, Whose Side Is HR Really On?

November 15, 2017 · 5:01 AM ET

TOVIA SMITH

EXCLUSIVE

PHOTO ILLUSTRATION BY SARAH ROGERS/THE DAILY BEAST

EXCLUSIVE

'Unsafe and Just Plain Dirty': Women Accuse Vice of 'Toxic' Sexual-Harassment Culture

The Daily Beast talked to more than a dozen former and current employees about the culture for women inside Vice Media. They spoke of harassing behavior and company indifference.

BRANDY ZADROZNY 11.15.17 9:30 AM ET



Recent data: What is going on out there?

Equal Employment Opportunity Commission Statistics

12,860

Sex-based harassment claims filed with EEOC in 2016

\$1 M

Total of 5 settlements over the six-week period ending January 12, 2018

83.4% Claims filed by females

17

Sexual harassment lawsuits filed by the EEOC in 2017

5

Sexual harassment lawsuits filed by the EEOC on 2016

EEOC Monitor: Recent sexual harassment settlements total \$1 mln (published Jan. 12, 2018) / Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010-FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm

Why Is This Important?

Personal Reasons

- You need to know when you may be acting inappropriately
- You need to know how to respond when someone else is acting inappropriately

Legal Reasons

- Conduct may create legal liability

Business Reasons

- Discrimination/harassment interferes with business
- Financial/reputational risks
- Lowers absenteeism and turnover

Moral Reasons

Employers have a minimum legal obligation to provide a workplace free from discrimination, harassment and retaliation!



Relevant Laws



- ❑ **Title VII of the Civil Rights Act of 1964, as amended (Title VII)**
 - ❑ Prohibits **discrimination**, **harassment** and **retaliation** in employment based on race, color, **sex**, religion and national origin
 - ❑ Sexual orientation may or may not fall with sex discrimination
- ❑ **Additional State and Local Ordinances**
 - ❑ Prohibits discrimination and harassment
 - ❑ May be broader: e.g., sexual orientation, gender identity, etc.

Overview of Title VII

- Title VII and related laws prohibit “adverse employment actions” against “protected classes” of individuals.



“Protected Classification”

- National Origin
- Disability
- Sexual Orientation
- Age
- Genetics
- Whistleblowing
- Gender Identity
- Sex
- Pregnancy
- Race
- Color
- Religion
- Gender
- Military Service



“Adverse Employment Action”

- Termination of Employment
- Failure to Hire or Promote
- Demotion or Denial of Benefits
- **Harassment**
- **Retaliation**



Forms of Sexual Harassment?



SEXUAL HARASSMENT COMPLAINT FORM

ALL INFORMATION WILL BE KEPT CONFIDENTIAL.

VICTIM'S NAME (Last)	(First)	(Middle Initial)	Home Telephone
Address (Mailing Address)	(City)	(State)	(Zip)
Incident Address			Other Telephone

Sexual harassment exists in two forms

- Quid pro quo*
- Hostile work environment

Hostile Work Environment Harassment

Involves harassment in the workplace that is:

1. **Unwelcome**
2. Based on **protected class status** (sex, gender, race, religion, etc.)
3. **Severe or pervasive** enough to change the conditions of employment and create an abusive environment



Examples of Physical Behavior That Could Constitute a Hostile Work Environment



- Giving a massage around the neck or shoulders
- Touching the person's clothing, hair or body
- Hugging, kissing, patting or stroking
- Touching or rubbing oneself sexually around another person
- Intentionally "bumping" into someone
- Exposing oneself

Examples of Verbal Communications That Could Constitute a Hostile Work Environment

- ❑ Referring to an adult as a girl, hunk, doll, babe, sweetheart or honey
- ❑ Whistling at someone, catcalls
- ❑ Making sexual comments about a person's body
- ❑ Making offensive comments or innuendoes, slurs, stories or jokes
- ❑ Turning work discussions to sexual topics
- ❑ Asking about sexual fantasies, preferences or history
- ❑ Using derogatory stereotypes or language that is offensive on the basis of gender, race, etc.



- ❑ Repeatedly asking out a person who is not interested
- ❑ Using crude, sexual language
- ❑ Telling lies or spreading rumors about a person's personal sex life
- ❑ Asking personal questions about social or sexual life

Examples of Non-Verbal Communications That Could Constitute a Hostile Work Environment



- Displaying sexually suggestive visuals
- Making sexual gestures with hands or through body movements
- Reacting negatively when a person passes by (especially in a group setting)
- Staring excessively or looking a person up and down (elevator eyes)
- Standing or sitting too close to someone
- Following a person
- Blocking a person's path
- Inappropriate electronic communication, e.g. emails, texts, etc.
- Displaying suggestive items (Nazi symbol, noose, etc.)
- Making facial expressions such as winking, throwing kisses, or licking lips

Harassment Through Technology and Electronic Communications



- Use of social media (Facebook, Twitter, Snapchat, Instagram, etc.) can be used to create a hostile work environment, even if done solely using personal or third party accounts
- Sending/forwarding sexual/racist emails or text messages
- Viewing sexual pictures where the screen can be seen by others
- Anything put in an email or text or viewed on a computer is subject to recovery by experts, even when deleted
- Company policies apply no matter the means of communication with co-workers

Who Can Be the Harasser/Victim?



- ❑ **The victim need not be the person to whom the conduct was directed**

- ❑ a witness to harassment can be a victim
- ❑ employees not granted a benefit may claim that sexual submission became a job requirement

- ❑ **The harasser and the victim can be**
 - ❑ a supervisor and a subordinate
 - ❑ employees at the same level
 - ❑ employees of the same sex
 - ❑ a customer/vendor/client and an employee





What is so difficult
about this for
employers?

You tell me:

**Unwelcome touching
or groping?**



- ❑ Barna poll of 1,019 adults in the United States, October 19-25, 2017
- ❑ Touching someone intentionally without their consent is sexual harassment.

96% Women agree

86% Men agree

The Behaviors Americans Count as Sexual Harassment: <https://www.barna.com/research/behaviors-americans-count-as-harassment>

You tell me: Non-consensual hugging?



- ❑ Reuters/Ipsos poll of 3,000 American adults, December 13-18, 2017
- ❑ Non-consensual hugging constitutes sexual harassment.

44% Yes, overall

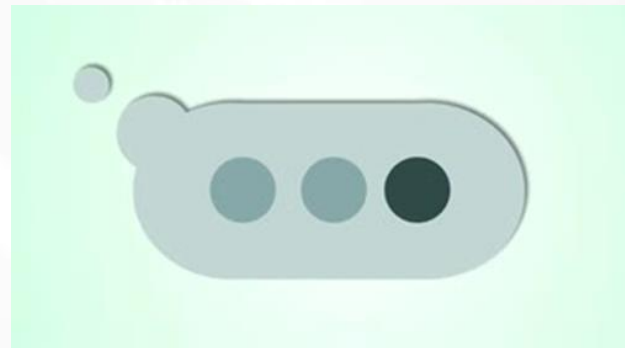
40% No, overall

52% Yes, racial minorities

39% Yes, whites

You tell me:

**Sexually explicit
emails or text
messages?**



- ❑ Barna poll of 1,019 adults in the United States, October 19-25, 2017
- ❑ Sexually explicit emails or text messages constitute sexual harassment.

83% Women agree

69% Men agree

The Behaviors Americans Count as Sexual Harassment: <https://www.barna.com/research/behaviors-americans-count-as-harassment>

You tell me: Comments about a person's body?

**INTERVIEWER: "WHAT DO YOU
MAKE AT YOUR CURRENT JOB?"**

**ME: "MOSTLY MISTAKES AND
INAPPROPRIATE COMMENTS."**

- ❑ Reuters/Ipsos poll of 3,000 American adults, December 13-18, 2017
- ❑ Unwanted compliments about appearance constitute sexual harassment.

38% Yes

47% No

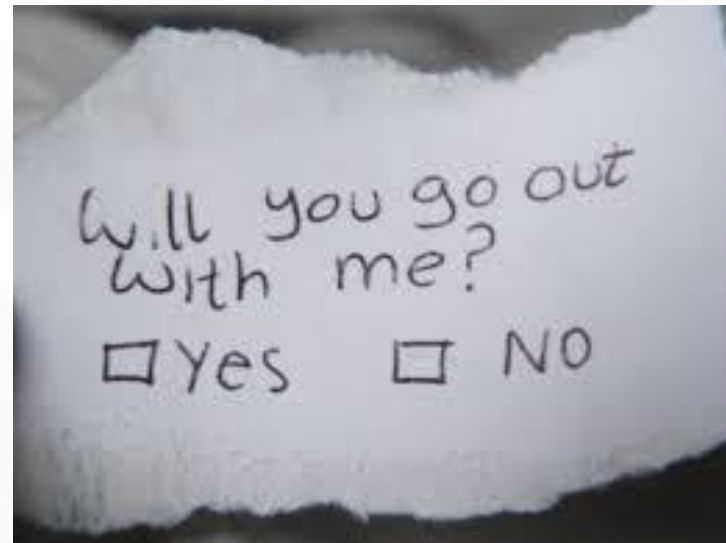
- ❑ Barna poll of 1,019 adults in the United States, October 19-25, 2017
- ❑ Having someone make comments about your looks/body constitutes sexual harassment.

86% Women agree

70% Men agree

The Behaviors Americans Count as Sexual Harassment: <https://www.barna.com/research/behaviors-americans-count-as-harassment>

**You tell me:
Being repeatedly
asked on a date after
rejection?**



- ❑ Barna poll of 1,019 adults in the United States, October 19-25, 2017
- ❑ Being repeatedly asked on a date after declining constitutes sexual harassment.

58% Women agree

47% Men agree

The Behaviors Americans Count as Sexual Harassment: <https://www.barna.com/research/behaviors-americans-count-as-harassment>

The background features a central horizontal band of solid orange color. Above and below this band are abstract, blurred light trails in shades of white and gray, creating a sense of motion and depth. The overall aesthetic is modern and technical.

The Gray Area of Unprofessional (But Perhaps Not Illegal) Conduct

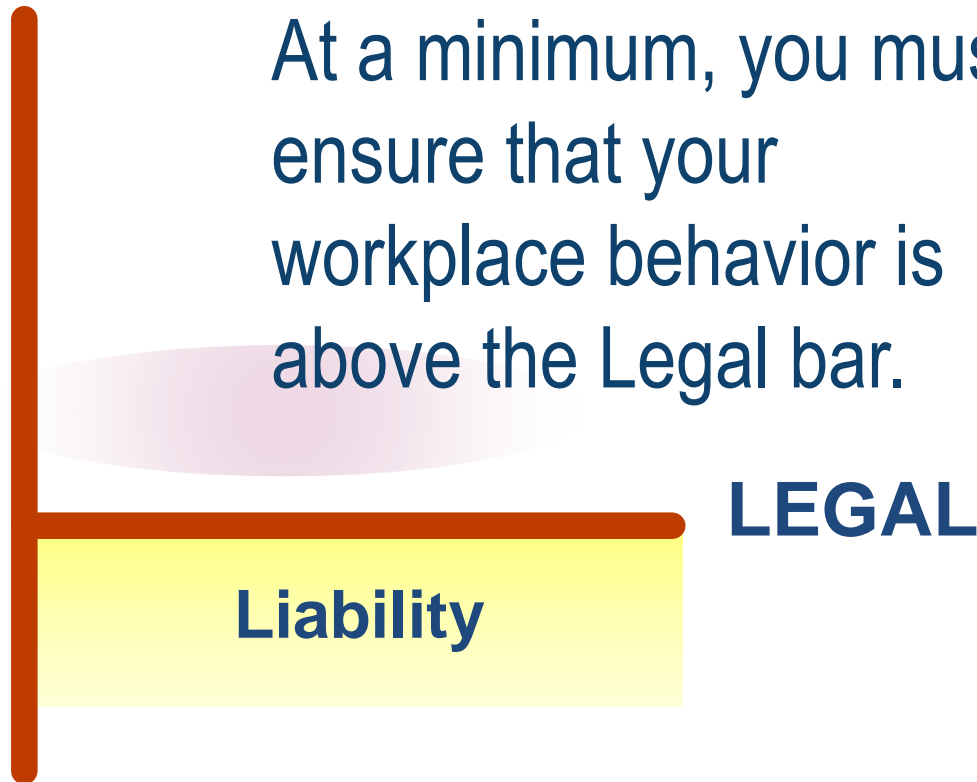
The “Gray Area”

- ❑ This “gray area” of bad behavior should be avoided because it is damaging to morale, can become illegal harassment, and can lead to other types of litigation and even to events of workplace violence



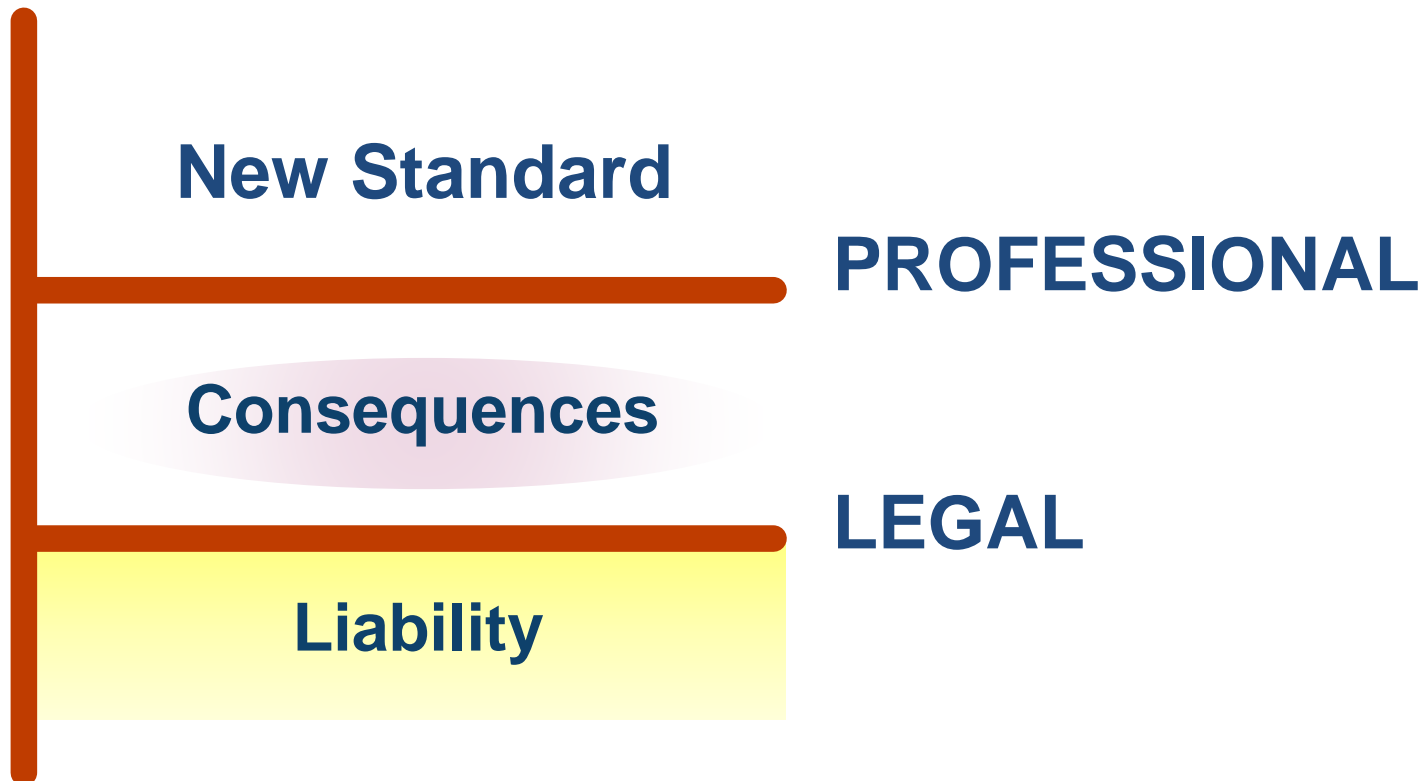
Expectations Under the Law

At a minimum, you must ensure that your workplace behavior is above the Legal bar.



BUT the Bare Minimum Is Not Enough

Employers expect your behavior to be above the Professional bar.



Unprofessional (Perhaps Not Illegal) Conduct

- Consensual affair with subordinate
- Excessive drinking at work functions
- Abusive/profane language or behavior
- Harassment based on non-protected class, e.g., political affiliation
- Bullying, teasing or taunting behavior
- Using condescending language
- Viewing/passing off-color emails
- Mocking/embarrassing client/co-worker



- Disclosing confidential information regarding client/co-worker
- Starting/spreading rumors
- Inappropriate, disorderly conduct

New Standard Driven By a New Reality



- ❑ 77% of American adults own a smartphone, up from just 35% in 2011¹
- ❑ 15 million text messages are sent every *minute* of every day worldwide, not including app-to-app messaging²
- ❑ 269 billion emails were sent worldwide per day in 2017, which is predicted to increase to 319.6 billion per day by 2021³
- ❑ **As a result, consequences can be swift and harsh**

1. Mobile Fact Sheet, <http://www.pewinternet.org/fact-sheet/mobile/> (Published Jan. 12, 2017)
2. 73 Texting Statistics that Answer all your questions, <https://www.textrequest.com/blog/texting-statistics-answer-questions/> (Published May 24, 2016, updated in 2017)
3. Number of sent and receive e-mails per day worldwide from 2017 to 2021 (in billions), <https://www.statista.com/statistics/456500/daily-number-of-e-mails-worldwide/>

Disclosure – Instant, Extensive Publication

- ❑ Local Newspapers/TV
- ❑ Social Media – Going Viral



Once a Lawsuit Has Been Filed, You Do Not Get To Edit the Complaint

[CLICK HERE FOR FREE DOWNLOAD](#)

JANE DOE,

Plaintiff,

v.

XXXXXXXXXXXX

Case No. 3:00-cv-

**D. VORCED AND ABC
CORPORATION,**

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, the Plaintiff, JANE DOE, who hereby states as follows:

1. Plaintiff's male supervisor, D Vored, exposed himself to the plaintiff, **sent her sexually explicit and threatening e-mails saying things like, "he would do her pipes," recommended an adult website to her and requested that she send him nude pictures of herself.**

2.

Disclosure – Then It Gets Worse

- ❑ Discovery is VERY broad – easy to establish “reasonably calculated”
- ❑ Depositions public
- ❑ Drag in coworkers as witnesses
- ❑ Time, resources and energy in defending the case



What Can You Do to Minimize Risk?

- If an employee informs you that he or she experienced or witnessed harassment or related retaliation (or if you observe such behavior or hear about such behavior), you need to take steps to address it.
- Ignoring the complaint may make the employer and its supervisors/HR liable for the harassment.
- What this means is that you must **CONDUCT AN INVESTIGATION!!**

The background features a large, vibrant orange horizontal band that curves slightly. Above and below this band, there is a complex 3D wireframe structure composed of numerous thin, white lines that form a grid-like pattern, possibly representing a data visualization or a digital landscape. The overall aesthetic is modern and digital.

#NotMeToo

Conclusions In The Wake Of #MeToo

- ❑ Do not fall into the complacency trap of #NotUs
- ❑ Take complaints seriously and investigate
- ❑ Smart organizations must implement a more rigorous plan for maintaining a harassment free work environment and appropriately address incidents
- ❑ Educate, train, repeat

Conclusions In The Wake Of #MeToo

- ❑ Risk is real and risk is Now – the information available to employees about these claims has never been so prevalent
- ❑ Complaints of harassment or discrimination can become charges filed with state and federal agencies and lawsuits filed by attorneys
- ❑ Agencies and lawyers will look at everything they can about an alleged harasser including personnel file, social media posts, emails and text messages. And deleting does no good . . .

REMEMBER...

- ❑ **IT ONLY TAKES A MINUTE TO DESTROY A REPUTATION THAT TOOK A LIFETIME TO BUILD!**

The background features a central horizontal band of vibrant orange. Above and below this band are abstract, high-contrast black and white patterns that resemble light trails or digital data streams, creating a sense of motion and depth.

THANK YOU!