

# EMPLOYMENT LAW UPDATE

TARA MARTENS MILLER

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# TODAY'S AGENDA

IHRC/EEOC  
COMPLAINTS AND  
INVESTIGATIONS

HARASSMENT AND  
DISCRIMINATION  
AND INTERNAL  
INVESTIGATIONS

ADA

# IDAHO LEGISLATIVE UPDATES

## ***Idaho Wage Claim Act Amended***

- ***Idaho Code Section 45-615***
- *Effective July 1, 2019, the Idaho Wage Claim Act is amended to lengthen the period of time an employee may pursue a claim for unpaid wages from 6 mos. to 12 mos. where an employee received some, but not all of the employee's wages. In circumstances where the employee has not received any wages, the employee is permitted up to two years to pursue a claim under the Idaho Wage Claim Act.*

# IDAHO LEGISLATIVE UPDATES

## ***Worker's Compensation***

### ***First Responders Psychological Injuries***

*Effective July 1, 2019, existing worker's compensation law amended to make psychological injuries suffered by first responders compensable.*

# ANTI-DISCRIMINATION LAW

## Idaho Human Rights Act - I.C. § 67-5909

Prohibits discriminate against a person because of, or on the basis of, race, color, religion, sex or national origin, age or disability.



# ANTI-DISCRIMINATION LAW

## Federal Anti-Discrimination Laws

Title VII of the Civil Rights Act:

Prohibits discrimination on the basis of race, color, religion, sex and national origin.

Age Discrimination in Employment Act (ADEA)

Americans with Disabilities Act (ADA)

Genetic Information Nondiscrimination Act (GINA)

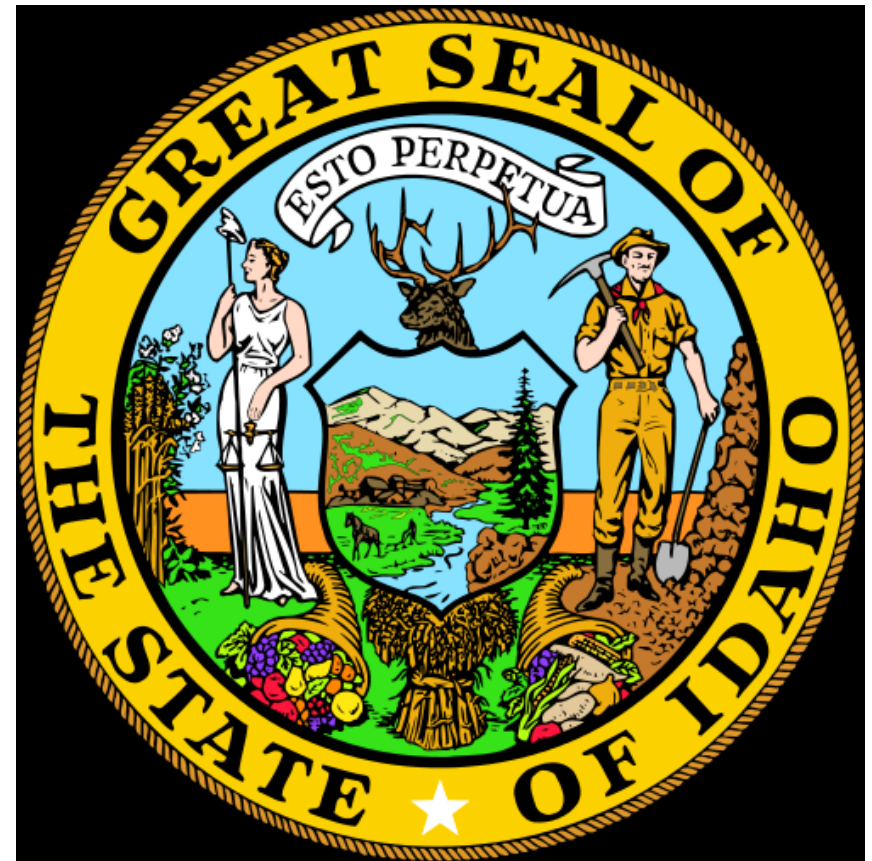
Pregnancy Discrimination Act (PDA)

Equal Pay Act (EPA)

# ADMINISTRATIVE ENFORCEMENT

## State Level

- Idaho Human Rights Commission



# ADMINISTRATIVE ENFORCEMENT

Federal Level

Equal Opportunity Employment Commission





# INTERNAL RESPONSE UPON RECEIPT OF CLAIM

- Take swift action upon receipt of claim or if aware of an issue likely to lead to a claim
- Consider insurance coverage and notice to insurer
- Conduct internal investigation
- Involve counsel to preserve privilege
- Be aware of retaliation and shunning issues
- Consider preservation obligation and implement litigation hold

# AGENCY INVESTIGATION

- EEOC or IHRC will investigate alleged unlawful discrimination
- Generally, claims must be filed within 300 days of alleged discrimination
- Agency will conduct investigation
- Investigation will include interview of the charging party

# RESPONDING TO CHARGE/COMPLAINT

- Important to do it right; statements made early will remain relevant later in litigation
- Well-crafted response essential
- Be proactive in defense; interview witnesses and relevant parties
- Prepare detailed response statement
- Defend and participate in interviews

# LITIGATION

- Charging party/complainant may file suit; generally 90 days after receiving disposition or “right to sue” from agency
- Agency may also file a complaint
- Triggers litigation process



# HOW TO PREVENT DISCRIMINATION CLAIMS

1. Policies
2. Recordkeeping
3. Training
4. Fairness and Consistency

# BEST PRACTICES RECAP

- Be mindful of protected classes when making employment decisions
- Consider whether employment practices result in disparate treatment or impact
- Implement training to ensure no discrimination
- Recruit, hire and promote with these principles in mind; do not rely on stereotypes or assumptions
- Ensure effective investigations
- Consider and update policies
- If a termination decision is made, consider the value of a **separation agreement** – a small price to pay to avoid defending an adverse employment administrative complaint and/or litigation

# IS ALL RUDE CONDUCT UNLAWFUL?



**Harassment vs. Discrimination  
vs. Obnoxious Behavior**

# LAWFUL VS. UNLAWFUL CONDUCT

- Workplace behavior becomes unlawful when it is based on a protected characteristic and results in discrimination, harassment, or retaliation

Sexually explicit  
jokes, posters,  
gestures or  
remarks

Ethnic slurs

Mocking a  
person's  
religious  
practices or  
beliefs

Segregating  
workers based  
on race or  
gender



# THE #METOO MOVEMENT



**Alyssa Milano**   
@Alyssa\_Milano

Follow

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

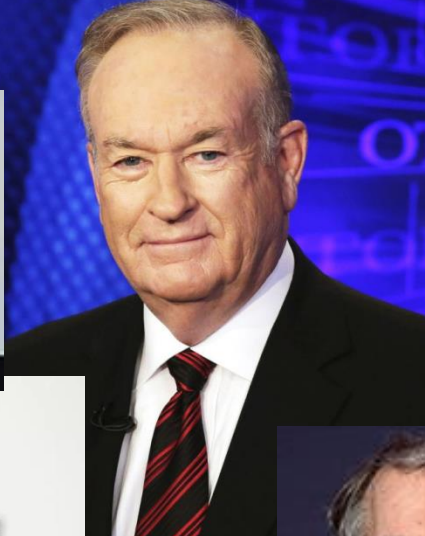
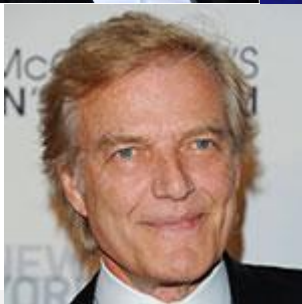


# THE SILENCE BREAKERS



Speaking at the Sundance Film Festival, Justice Ruth Bader Ginsburg talked about her own #MeToo moment. A professor gave her a copy of a test early and she “knew exactly what he wanted in return” (she graduated in 1959).

# ACCUSATIONS HITTING THE HIGHEST LEVELS



# WHAT IS THE FALLOUT OF THE #METOO MOVEMENT?

So far, the movement has meant:

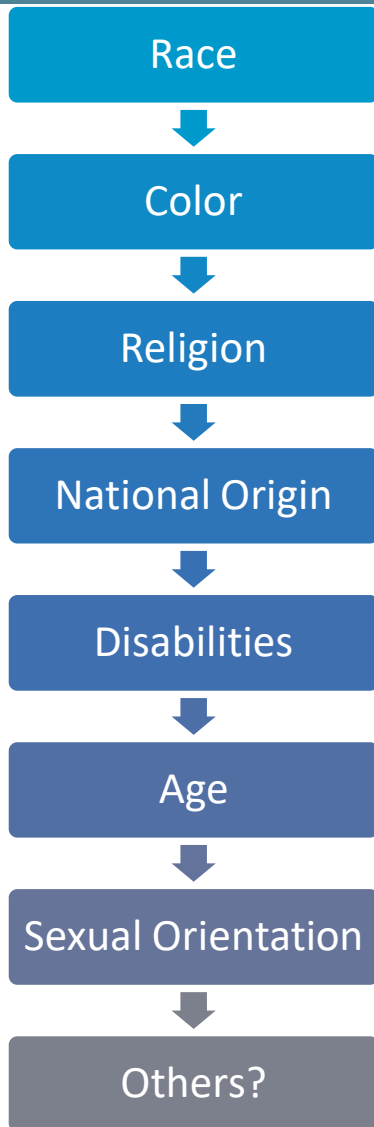
No one is above the law: CEOs, company founders, and high profile employees are being fired

More willingness for those subject to harassment to speak out and file lawsuits

Media attention to the issue (creating PR nightmares for affected companies)

Efforts to get harassment settlements out in the open (e.g., tax reform act included provision that confidential sexual harassment settlements are not deductible for the company)

# HOSTILE WORK ENVIRONMENT HARASSMENT: IT'S NOT JUST SEX!

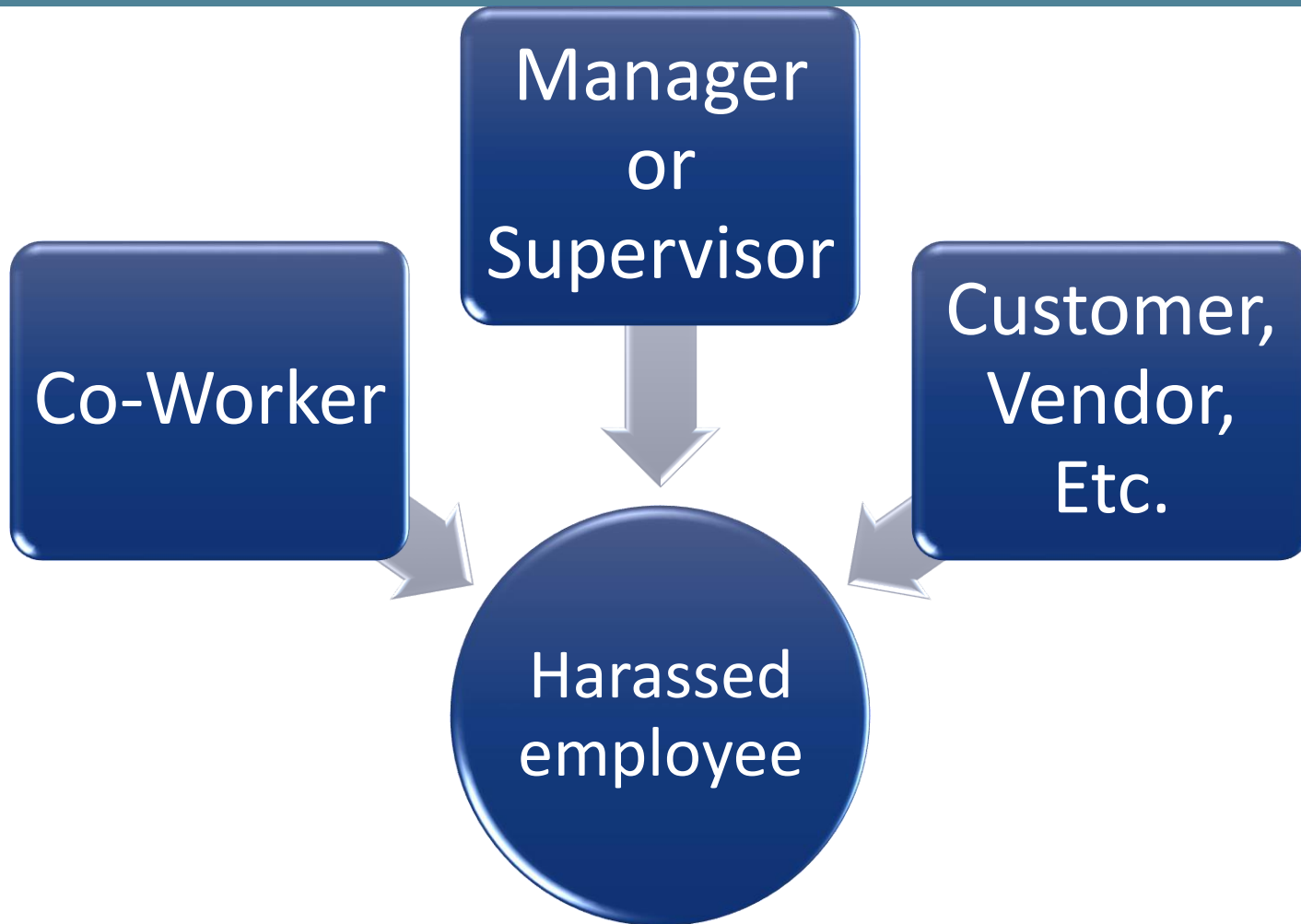


# LET'S GO MORE IN-DEPTH

- What types of behavior can result in unlawful harassment?
  - Verbal
  - Physical
  - Visual



# WHO CAN BE A HARASSER?



# LIABILITY FOR HARASSMENT BY NON-SUPERVISORS

An employer is liable for harassment by a co-worker or third party if the employer was negligent, meaning employer:

Knew or should have known of the conduct, and

Failed to take immediate and appropriate corrective action



# PREVENT SEXUAL HARASSMENT

- Establish a culture free from harassment
- Highest levels of organization, including managers and supervisors, must set the example of no tolerance
- No one gets away with sexual harassment, regardless of position or importance to the organization



# YOUR ROLE IN PREVENTING HARASSMENT AND DISCRIMINATION

- Don't tolerate inappropriate behavior:
  - Overtly or subtly related to sex or gender, age, color or ethnic origin, disability, religion
  - Physical, threatening, or confrontational behavior
  - Rude or abusive behavior directed toward a particular person or groups
- Be diligent in watching for and dealing with conduct which could be a problem or lead to a problem

# INVESTIGATIONS

Treat every  
complaint  
seriously

Promptly  
and  
thoroughly  
investigate

Reach a  
conclusion



# INVESTIGATIONS

- An adequate investigation, either internal or by an outside resource, is imperative
- When we conduct investigations on behalf of our client employers, each individual interviewed is provided with the following preliminary remarks:
  - We have been asked to conduct an independent investigation, review and/or cultural assessment into potential concerns related to employment culture and statements made by [employer's] employees ... (cont.)

# PRELIMINARY REMARKS (CONT.)

1. I am not recording this conversation and ask that you not record it. I am taking notes.
2. I am a lawyer for [employer] and represent only [employer]. I do not represent you personally. If you would like legal advice, you should consult your own attorney.
3. The purpose of our discussion is for me to gather facts in order to provide legal advice to [employer].
4. Your communications with me may be protected by the attorney-client privilege, but the privilege belongs only to [employer] and employer may elect to waive the privilege, but you cannot.

# PRELIMINARY REMARKS (CONT.)

5. Complete honesty of the witness is required.

6. No retaliation for bringing a complaint or participating in the investigation.

7. Confidentiality of investigation – maintained to the extent possible, but very difficult under the present circumstances and the limited parties to be interviewed. We need your cooperation. While you may discuss the facts of what has happened with others, I ask that you not share or discuss the specifics of our conversation itself so that my other interviews will not be impacted.\*

8. Do you have any questions before we begin.

# CONFIDENTIALITY OF THE INVESTIGATION

- Until December 19, 2019, the National Labor Relations Board rules significantly restricted employers' abilities to require confidentiality regarding workplace investigations. It found in 2015 that employees have the right to discuss ongoing disciplinary investigations and held employers could not maintain a blanket rule requiring confidentiality.

# CONFIDENTIALITY OF THE INVESTIGATION (CONT.)

- However, on December 19, 2019, it reversed course, in *Apogee Retail*, the Board recognized that employers and employees each have substantial interest in keeping investigation details confidential that outweigh any adverse impact on employees' rights. Specifically:
  - Confidentiality rules help prevent misconduct (including theft) by ensuring a prompt investigation.
  - Assurances of confidentiality are necessary to protect employee witnesses from retaliation.
  - Confidentiality helps to ensure the integrity of the investigation.



# CONFIDENTIALITY OF THE INVESTIGATION

- The ability to require employee confidentiality during the course of the investigation, however, may not extend after the conclusion of an investigation.
- It is recommended employers review and modify investigative policies and procedures to require confidentiality for the duration of an active investigation.

# BE CAREFUL WITH SETTLEMENTS

- Settling sexual harassment claims could send inconsistent messages, especially if the perpetrator is kept as an employee
- In addition, the recent tax reform bill includes a provision that no tax deduction is allowed for any settlement or payment related to sexual harassment or abuse if subject to a non-disclosure agreement



# RETALIATION

- Often, employers are found liable for retaliation, even when the underlying harassment/discrimination case is dismissed



# RETALIATION

## What is unlawful retaliation?

- An employee suffers a materially adverse employment action in the workplace after (and because of) engaging in a protected activity

# INADVERTANTLY PERPETUATING WAGE DISCRIMINATION

- THE EQUAL PAY ACT (1963)
  - Simple principle: Equal Pay for Equal Work
  - 50 years later, women continue to earn 20% less than men

# AMERICANS WITH DISABILITIES ACT

ADA Protections

Reasonable  
Accommodations

Medical Exams

Potential  
Consequences of  
Violating ADA



# AMERICANS WITH DISABILITIES ACT (ADA)

- 1990 Federal law:
  - Prohibits discrimination on the basis of disability against a qualified individual; and
  - Requires employers to make a reasonable accommodation for an individual with a disability unless the accommodation would impose an undue hardship on the employer
  - 2008 Amendments (ADAAA)



# WHICH INDIVIDUALS ARE PROTECTED?



Employees or applicants with a “disability” who can perform the essential functions of the job with or without reasonable accommodation



# WHAT IS A DISABILITY UNDER THE ADA?

Definition interpreted broadly ...

- A physical or mental impairment that substantially limits one or more major life activities of such individual;
- A record of having such an impairment; or
- Being regarded as having such an impairment

# WHAT ARE “MAJOR LIFE ACTIVITIES?”

- Walking
- Seeing
- Hearing
- Speaking
- Thinking
- Sleeping
- Other activities of central importance to most people’s lives
- Learning
- Breathing
- Caring for oneself
- Working
- Performing manual tasks
- Major bodily functions (e.g., normal cell growth, digestive, respiratory, brain function, etc.)

# “SUBSTANTIALLY LIMITS”

- Construed in favor of broad coverage
- Inquiry into whether an impairment “substantially limits” a major life activity should not demand extensive analysis



# EXAMPLES OF ADA-PROTECTED DISABILITIES

- Blindness
- Loss of limb
- Speech impairments
- Loss of hearing
- Epilepsy
- Muscular dystrophy
- Cancer
- Heart disease
- Diabetes
- Drug addiction
- Major depression
- Bipolar disorder
- Anxiety
- Schizophrenia
- Personality disorders
- Learning disabilities
- Just about everything but wearing glasses!

# REASONABLE ACCOMMODATIONS

Accommodation:

- Any change in work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities
- Remove barriers for qualified individuals with disabilities

# REASONABLE ACCOMMODATIONS

- Must accommodate a “known” disability
  - Obvious disability (e.g., in a wheelchair, etc.)
  - Upon request by applicant or employee – No “magic words” must be used
- Triggers interactive process



# INTERACTIVE PROCESS

Discuss with employee

Evaluate essential job functions

Identify limitations/restrictions

# INTERACTIVE PROCESS CONTINUED


Determine range of possible accommodations



Evaluate, considering undue hardship



Tell employee and document





# WRITTEN DOCUMENTATION

Employer may require documentation needed to establish that a person has an ADA disability and that disability necessitates a reasonable accommodation

- Should come from an appropriate health care or rehabilitation professional
- Can't request if disability and need for accommodation are obvious or if individual has provided employer with sufficient information
- Keep it separate and confidential

# UNDUE HARDSHIP

- Not required to provide a reasonable accommodation that will result in an undue hardship to the company
- An “undue hardship” generally means significant difficulty or expense incurred by the employer
- Expense alone, however, not definitive!

# NO DIRECT THREAT

- May exclude individuals who pose a direct threat to the health or safety of themselves or others
- Requires a significant risk of substantial harm
- Cannot be based on fear, ignorance, assumptions, etc.
- If threat can be eliminated through a reasonable accommodation, must do so

# EXAMPLES OF REASONABLE ACCOMMODATIONS

- Change to job application process
- Leave of absence
- Part-time or modified job schedule
- Job restructuring
- Acquiring or modifying equipment or the workplace
- Changing non-essential policies
- Reassignment to a vacant position



# GENERAL ACCOMMODATION RULES

## Employers need not:

- Eliminate an essential job function
- Lower quality or production standards to provide a reasonable accommodation
- Provide items for personal use, such as glasses or hearing aides
- Tolerate egregious or criminal conduct (e.g., violence, threats of violence, or theft), even if this conduct results from a disability

# CONFIDENTIALITY

- Medical information must be treated as confidential and kept in a separate medical file (not the personnel file)
- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and any necessary accommodations
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment

# DISCIPLINING DISABLED EMPLOYEES

- Employee is not “qualified” if unacceptable behavior threatens the safety of others, even if due to a mental disability
- Example – *Mayo v. PCC Structural*
  - Termination of employee was permissible because his stress led to death threats
  - He was unable to appropriately handle stress and interact with others – an “essential function” of his job

# QUESTIONS?

Tara Martens Miller, Of Counsel

Office: (208) 383-3932

[TMMiller@hollandhart.com](mailto:TMMiller@hollandhart.com)