Understanding Title IX and Title VII Procedures

New Title IX Regulations – Employees Impose additional procedural requirements Only for allegations meeting new sexual harassment definition Expressly contemplate "dual" compliance approach with Title IX and Title VII

When Do IX Obligations Kick In?

- "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."
- "'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

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Hearing = "Formal Complaint" + "Sexual Harassment"

Formal complaint:

"document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment."

"At the time of filing" complainant must:

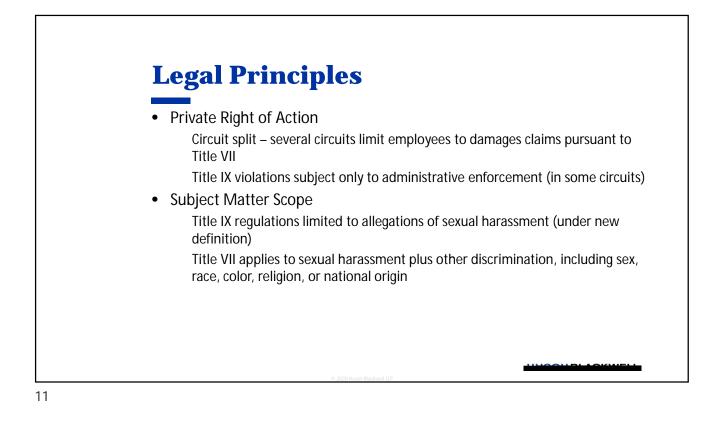
be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."

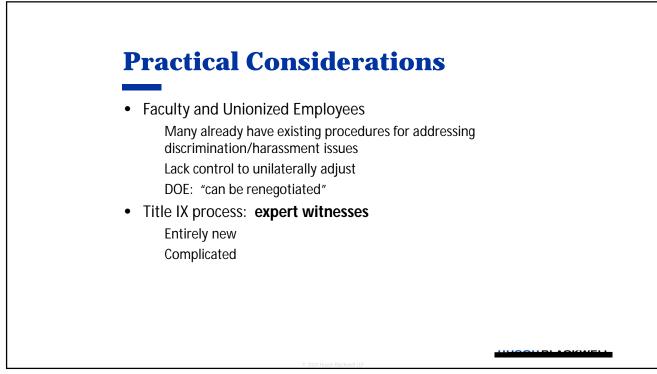
Hearing = "Formal Complaint" + "Sexual Harassment"

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and**

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Hypothetical Two

- Employee A goes to HR to express concerns that Supervisor is making sexual comments to Employee B on a regular basis.
- HR reaches out to Employee B who confirms the sexual comments but says, "I don't want you to do anything about it. I'm not filing a formal complaint."
- 1. Is IX implicated here?
- 2. Is VII implicated here?
- How should institution respond in satisfying obligations under VII and IX?

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Institutional Decision Points

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- 1. Will we apply IX rules/procedures to all allegations of sex discrimination (or other types of discrimination) regardless of whether they are technically covered by IX regs, or only to allegations of IX harassment?
- 2. Assuming we have different rules/procedures, how will we clarify nature of sexual harassment allegations as much as possible at the outset of handling?
- 3. How will we handle sex harassment claims in the absence of a "formal complaint"?

Hypothetical Three



- HR interviews Employee B who confirms that Dean has repeatedly touched Employee A in a sexual and unwelcomed way. Employee B, though, says he does not want to get involved and will not participate in any sort of hearing. Fearful of the Dean, Employee A also refuses to participate in any hearing.
- How should HR respond in satisfying obligations under VII and IX?

- 1. Is IX implicated here?
- 2. Is VII implicated here?
- 3. What is likely result of IX hearing process?
- 4. Are there VII concerns with this?

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5. How to reconcile?

Institutional Decision Points

- 1. If a respondent is cleared of a Title IX violation, will school still consider disciplining pursuant to Title VII?
- 2. What if reason for no IX finding is absence of witnesses at hearing (but investigation uncovered facts supporting discipline)?
- 3. If answer to (1) is "yes," how will this be memorialized in policy?
- 4. If answer to (1) is "yes," how will process unfold?

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Other Questions

3. "At will" employment – still exist when sexual harassment is at issue?

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4. State law

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