

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

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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.”

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Hearing = “Formal Complaint” + “Sexual Harassment”

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

1. 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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Legal Principles

- Private Right of Action
 - Circuit split – several circuits limit employees to damages claims pursuant to Title VII
 - Title IX violations subject only to administrative enforcement (in some circuits)
- Subject Matter Scope
 - Title IX regulations limited to allegations of sexual harassment (under new definition)
 - Title VII applies to sexual harassment plus other discrimination, including sex, race, color, religion, or national origin

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Practical Considerations

- Faculty and Unionized Employees
 - Many already have existing procedures for addressing discrimination/harassment issues
 - Lack control to unilaterally adjust
 - DOE: “can be renegotiated”
- Title IX process: **expert witnesses**
 - Entirely new
 - Complicated

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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?
 3. How should institution respond in satisfying obligations under VII and IX?

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Institutional Decision Points

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"?

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Hypothetical Three

- Employee A reports that Dean repeatedly sexually touched Employee A & that this sexual touching was witnessed by Employee B.
 - 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?
 5. How to reconcile?

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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?
- 4. State law

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