

## What am I Missing?

A Town Hall Conversation on Diversity and its Impacts on the Legal Profession  
May 16, 2019 – Doubletree by Hilton Lisle/Naperville

### Moderator

Hon. Vincent F. Cornelius, Judge, 12th Judicial Circuit (Will County)

### Panelists

Joseph Flynn  
Associate Director for  
Academic Affairs  
Northern Illinois University  
Center for Black Studies

Jennifer Adams Murphy  
Shareholder and  
Senior Attorney  
Wessels Sherman

Alex Karasik  
Attorney  
Seyfarth Shaw LLP

### Presented by



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## AGENDA

### 1:00 – 1:15 PM – Welcome and Introductions

### 1:15 – 2:15 PM – The Past: Where are we and how did we get here?

Our panel will first discuss the sociological and historical underpinnings of the issue of Diversity. Time permitting, topics will include:

- The evolution of Social Justice and what it means to be socially just.
- Understanding resistance in the face of social change.
- The impact of implicit bias on law and public policy.

### 2:30 – 3:30 PM– The Present: How is Diversity shaping the current landscape in the workplace?

Our panel will next turn to a discussion of the issues that overlay Diversity issues on workplace practices, in particular with regard to recruiting, interviewing, hiring, supervision, compensation, and management of attorneys and support staff. Time permitting, topics will include:

- Employer obligations toward protected employee classes under state and federal law.
- The impact of #MeToo on EEOC initiated litigation and settlements.
- Case law defining race and religious discrimination in the workplace.
- The intersection of privacy regulations and Diversity.

### 3:45 – 4:45 PM – The Future: Where should we go and how do we get there?

To conclude the day, our panel will share their thoughts and guidance on where we *should* go, as well as practical ideas for policies and procedures that can be implemented throughout the legal profession by attorneys, law firms, and bar associations to continue to address Diversity individually and collectively.

Time permitting, topics will include:

- Reflecting Diversity in recruiting and hiring practices.
- Standards and measures that can be used to gauge the effectiveness of Diversity efforts
- Addressing unintended impediments to diversity such as nepotism, cronyism and cliques that go beyond race, sex or protected classes.
- Attorney and support employee training that addresses stereotyping and bias in client and potential client relations.
- Actions to prevent discrimination against a racial minorities
- Structuring compensation to prevent pay equity litigation.

### 4:45 – 5:15 PM – Closing remarks and summary of takeaways

- What have we heard that we had not previously considered?
- What practical steps can we take to implement processes and policies to appreciate and embrace diversity in a just manner?

### 5:30 – 7:30 PM – Networking Reception and DuPage County Bar Association Monthly Social

## PANELIST BIOGRAPHIES

**Dr. Joseph Flynn** is the Associate Director for Academic Affairs for the Center for Black Studies and an associate professor of Curriculum and Instruction at Northern Illinois University. He is also president of the American Association for Teaching and Curriculum. His teaching and scholarship focus on the intersection of multicultural and social justice education, Whiteness Studies, media and popular culture, and curriculum. In addition to his professional development work with regional schools and colleges in northern Illinois, Dr. Flynn has published scholarship related to the aforementioned topics, and he co-edited the book *Rubric Nation: Critical Inquiries on the Impact of Rubrics in Education* (Information Age Publishing, 2015). He has guest edited a special edition on African Americans in popular culture for *The Black History Bulletin*, the oldest African American themed education journal in the United States, founded by the great African American historian Carter G. Woodson. More recently, Dr. Flynn founded the three-day Social Justice Summer Camp for Educators at Northern Illinois University. Additionally, Dr. Flynn serves as an editorialist on *Perspectives*, a radio program on WNII, an NPR affiliate, and as a co-host for the podcast *Mental Illness in Popular Culture*. Most recently, Dr. Flynn published *White Fatigue: Rethinking Resistance for Social Justice* (Peter Lang, 2018), a book that considers the critical question of why is it challenge to teach White students about race? The book has been awarded the O.L. Davis, Jr. Outstanding Book Award from the American Association for Teaching and Curriculum. In his free time he enjoys watching and discussing great movies, television, an music, stimulating discussions with friends, spending time with family, and a vigorous game of Madden.

**Alex Karasik** is an associate in the Chicago office of Seyfarth Shaw LLP, where he has practiced the last four years. A member of the Labor & Employment Department, Alex focuses his practice on a wide range of employment law matters, specializing in the defense of class and collective actions involving claims of discrimination and wage and hour violations. He has experience representing clients across a wide array of industries, including restaurants, retailers, staffing firms, and logistics providers. Prior to practicing law, Alex worked for the U.S.C. Trojans football team in recruiting and football operations. He also worked at Fox Sports, where he assisted in the production of NFL and MLB highlights. Alex has provided expert analysis and legal insight for Forbes, Legal Newsline, and the Cook County Record and is an active member of the Federal Bar Association. He holds a B.A. in Communication from Univ. of Southern California (2010), an M.A. in Communication Management, Univ. of Southern California (2012), and a J.D., University of Notre Dame Law School (2015).

**Jennifer Adams Murphy** has over 30 years of experience in employment and commercial litigation. Ms. Murphy is a cum laude graduate of Marquette Law School where she served as Articles Editor of the Marquette Law Review. Following graduation from law school, Ms. Murphy was appointed as the judicial clerk to the Hon. Justice Louis J. Ceci of the Wisconsin Supreme Court. After her clerkship, Ms. Murphy's career has included work as a litigator for a major Chicago law firm and 30 years of private practice in the areas of employment discrimination, retaliatory discharge, non-compete disputes, defamation and various other employment and commercial disputes and litigation. Ms. Murphy has represented clients before the United States Equal Employment Opportunity Commission, the Illinois Department of Human Rights, the Illinois and U.S. Departments of Labor and various Illinois circuit and appellate courts as well as federal district and appellate courts in Illinois and throughout the Midwest.

# Session One – The Past

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Where are We and How did we  
Get Here?



# What is workplace diversity?

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Workplace diversity is understanding, accepting, and valuing differences between people including those:

of different races, ethnicities, genders, ages, religions, disabilities, and sexual orientations

with differences in education, personalities, skill sets, experiences, and knowledge bases

Interestingly, research by Deloitte finds that diversity is perceived differently by generations. Millennials view workplace diversity as the combining of different backgrounds, experiences, and perspectives, and they believe taking advantage of these differences is what leads to innovation.

Gen Xers and Boomers, on the other hand, view workplace diversity as equal and fair representation regardless of demographics without necessarily considering diversity's relationship with business results.

# What is inclusion?

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Inclusion is a collaborative, supportive, and respectful environment that increases the participation and contribution of all employees.

# What is diversity and inclusion?

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Diversity and inclusion is a company's mission, strategies, and practices to support a diverse workplace and leverage the effects of diversity to achieve a competitive business advantage.

# Historic Development of Whiteness/White Racism

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The category of people called White did not exist before 1681.

- Not in literature, Not in law, Not in social conversation

Early colonial America was more interracially cooperative than taught.

Anti-miscegenation laws appear beginning 1664.

1691-1720 Virginia lawmakers passed a series of laws that set apart “British and other Whites” from non-Whites.

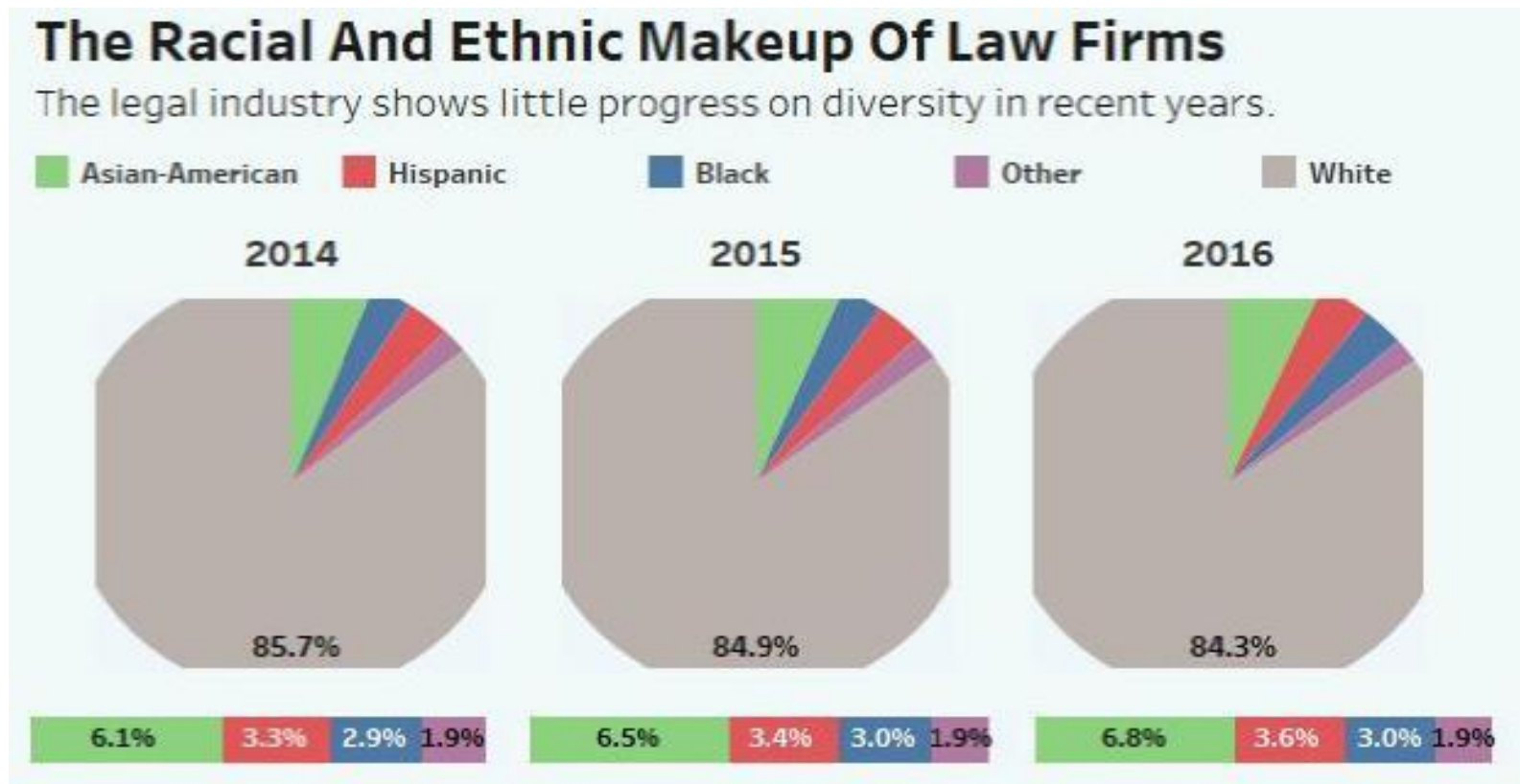
1790 first Naturalization Law required Whiteness to be a citizen of U.S.

By 1720, all colonies had laws marginalizing non-Whites.

1930s-1960s, of all FHA loans approved to **qualified** applicants over 90% went to Whites.



# THE HISTORICALLY WHITE MALE PROFESSION



LAW 360 2017 DIVERSITY SNAPSHOT

# Bradwell v. State, 83 U.S. 130 (1873)

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Affirmed Illinois Supreme Court denying admission of women to bar. Concurrence:

*[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood*

# In re Application of Bradwell 55 Ill. 535 (1886)

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In the Illinois Supreme Court's decision denying admission of a woman to bar, the Court comments on resistance to change within the bar:

*While those theories which are popularly known as "woman's rights" can not be expected to meet with a very cordial acceptance among the members of a profession, which, more than any other, inclines its followers, if not to stand immovable upon the ancient ways, at least to make no hot haste in measures of reform.*

# Law School Admissions to Minorities and Women

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- Harvard Law School did not admit women until 1950. Ruth Bader Ginsburg one of first women admitted.
- Notre Dame Law School did not admit women until 1966.
- *Sweatt v. Painter*, 339 U.S. 629 (1950) (Homan Sweatt had to pursue his case challenging the University of Texas Law School's refusal to admit African Americans to the Supreme Court. Sweatt refused to attend the black law school because of the superior resources of the University of Texas. Supreme found that the University of Texas policy violated the 14<sup>th</sup> Amendment).

# Larger Firms are Slightly More Diverse

## Sizing Up The US Law Firm

The average representation of minorities in law firm roles — from associate to equity partner — varies slightly by firm size.

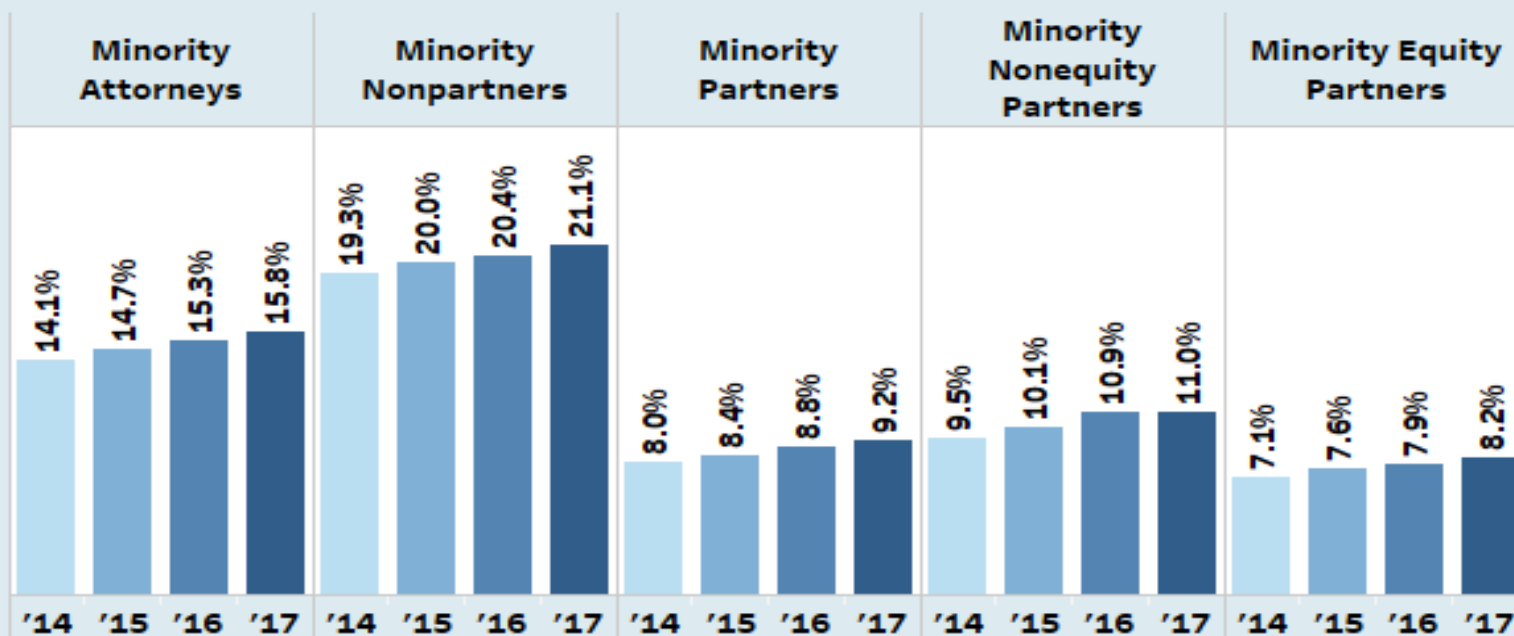
	20-149 attys	150-299	300-599	600+
Minority Attorneys	13.6%	12.0%	14.0%	17.0%
Minority Non-Partners	17.7%	16.1%	18.9%	21.4%
Minority Partners	9.8%	7.9%	8.0%	9.8%
Minority Equity Partners	8.8%	6.5%	7.0%	8.4%

LAW 360 2017 DIVERSITY SNAPSHOT

# Diversity: Changing Slowly

## Diversity Stagnates At US Firms

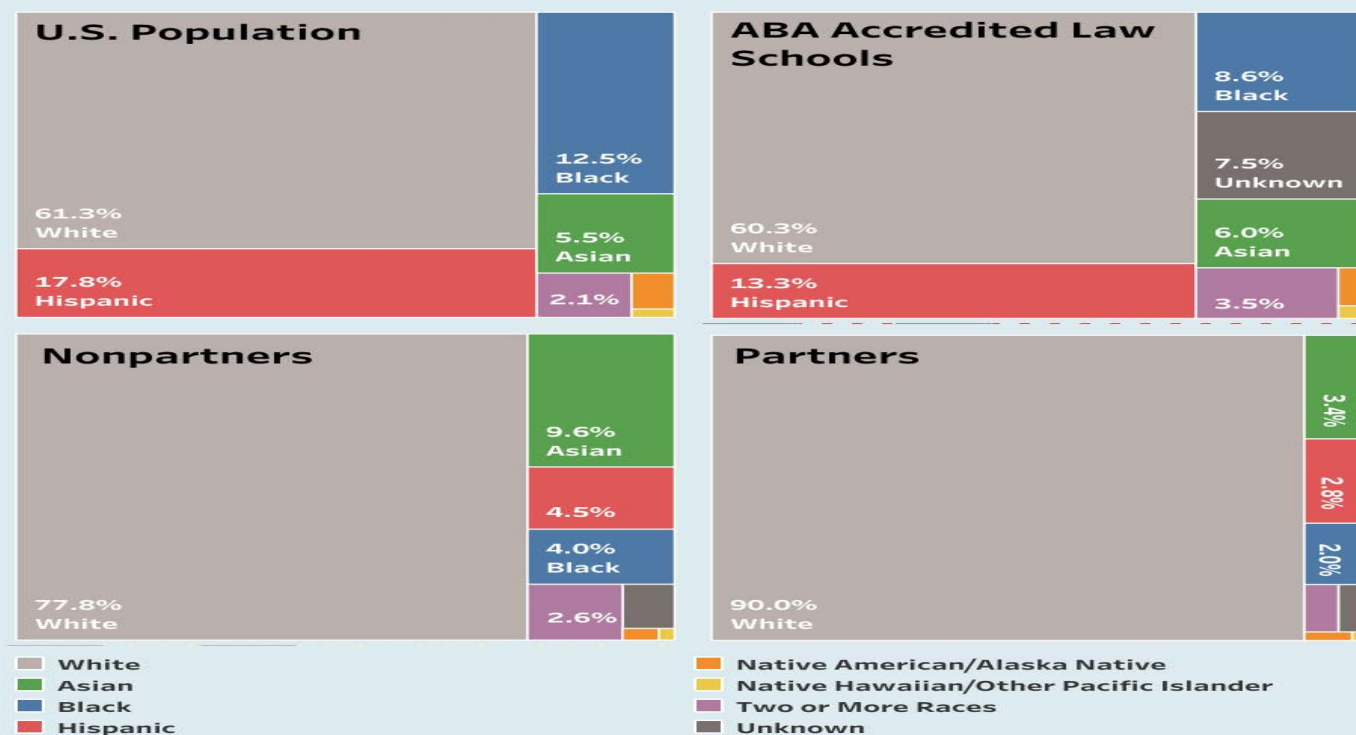
The proportion of minority attorneys grew by less than a percentage point in 2017.



# From Law School to Partnership, Diversity Decreases

## At Higher Levels, Lower Diversity

The ranks of minorities shrink on the path from law student to law partner.



LAW 360 2018 DIVERSITY SNAPSHOT

# Regents of University of California v. Bakke, 438 U.S. 265 (1977)

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U.S. Supreme Court holds that University of California Medical School's affirmative action plan, with a race-based set aside, violative of Equal Protection Clause. Justice Powell, in a splintered decision states:

*[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.*



# Grutter v. Bollinger, 539 U.S. 306 (2003)

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U.S. Supreme Court finds that University of Michigan Law School consideration of “soft” variables in connection with its race conscious admissions program did not violate the Equal Protection Clause.

Court found that achieving diversity was a compelling interest that supported the narrowly tailored program which did not use a quota but instead considered race or ethnicity only as a “plus” in an applicant’s file.

# DIVERSITY ≠ AFFIRMATIVE ACTION

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To embrace diversity is not to prefer one race, national origin, religion, disability status, gender, sexual orientation or identity to another.

Diversity does not require preference of a less qualified candidate in favor of a candidate that is a member of a protected group.

To improve diversity requires questioning the possible existence of implicit bias and thinking about the advantages a more diverse practice can bring.

# Session Two – The Present

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How is Diversity Shaping the Current Landscape in the Workplace?



# Federal Workplace Discrimination Laws

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There are several federal laws that prohibit workplace discrimination, including:

- **Title VII of the Civil Rights Act of 1964 (Title VII)**, which prohibits employment discrimination based on race, color, religion, sex, or national origin.
- **The Equal Pay Act of 1963 (EPA)**, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
- **The Age Discrimination in Employment Act of 1967 (ADEA)**, which protects individuals who are 40 years of age or older from workplace discrimination.

# Federal Workplace Discrimination Laws

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**The Americans With Disabilities Act of 1990 (ADA)**, which prohibits employment discrimination against qualified individuals with disabilities in the private sector.

**The Civil Rights Act of 1991**, which, among other things, provides for levels of monetary damages in cases of intentional employment discrimination.

**The Rehabilitation Act of 1973**, which prohibits employment discrimination against qualified federal government employees with disabilities.

**The Genetic Information Nondiscrimination Act of 2008 (GINA)**, which prohibits employment discrimination against employees or applicants because of genetic information.

# Federal Workplace Discrimination Laws

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Under Title VII, the ADA, and the ADEA, it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- hiring and recruitment;
- job appraisals and testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and leave of absence; or,
- other terms and conditions of employment.

# Federal Workplace Discrimination Laws

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Discriminatory practices under these federal laws also includes:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and,
- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. \*Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.\*

# The U.S. Equal Employment Opportunity Commission (“EEOC”)

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The EEOC, which was established through Title VII of the Civil Rights Act of 1964 (“Title VII”), is responsible for enforcing federal workplace discrimination laws

Employers with at least 15 employees are covered by these statutes (20 employees in age discrimination cases)

The EEOC is headquartered in Washington, D.C., and maintains 15 District Offices and 53 Field Offices throughout the country



# Illinois Workplace Discrimination Laws

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## **The Illinois Human Rights Act (“IHRA”)**

- Covers generally the same protected categories as federal workplace discrimination statutes (though the IHRA is a more expansive)
- Currently, the IHRA covers employers who employ 15 or more employees within Illinois for at least 20 weeks during the year
  - However, the Illinois Legislature is considering an amendment to the IHRA that would allow employers of any size to be liable under the IHRA

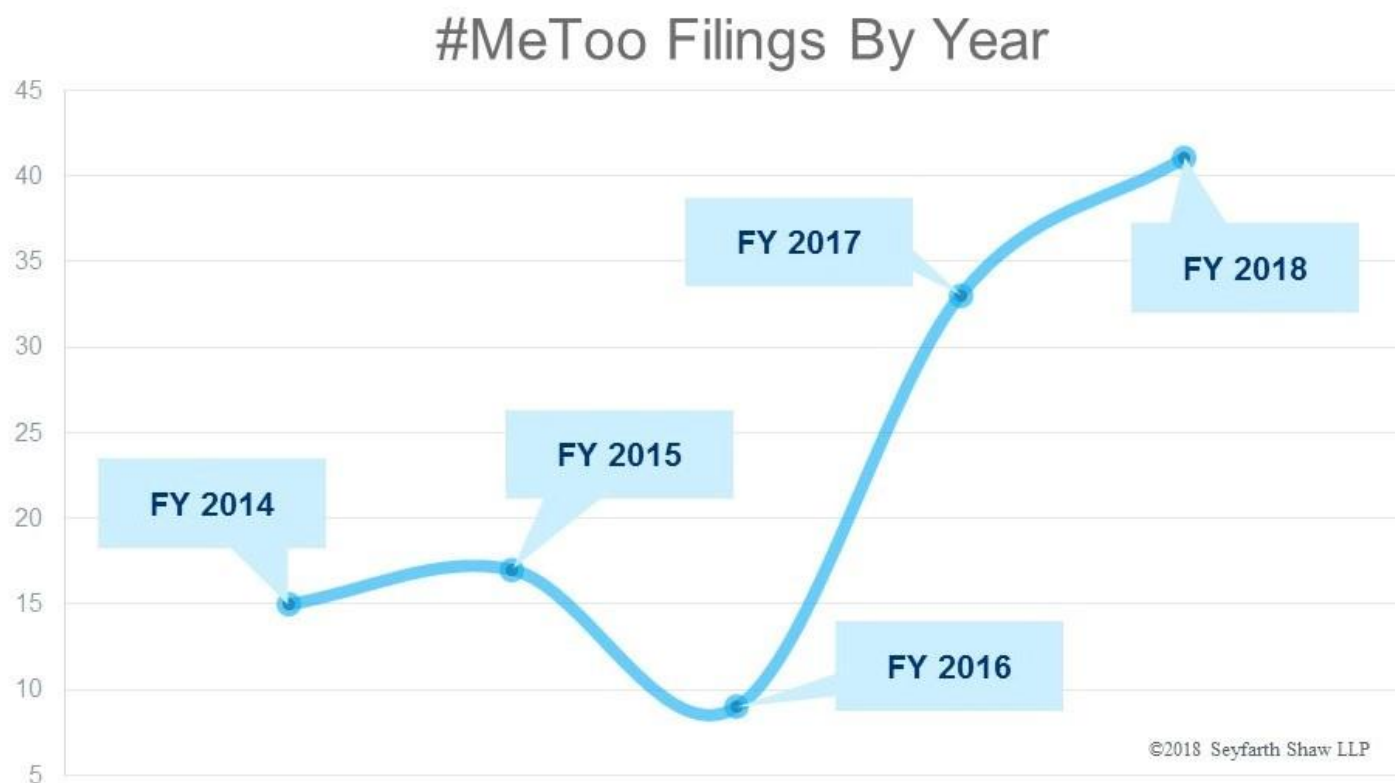
**The Illinois Department of Human Rights (“IDHR”)** is the state agency responsible for enforcing state antidiscrimination laws

# Workplace Impact of the #MeToo Movement

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- The latest employment law trend is the #MeToo Movement, a recent social phenomenon with significant implications on the workplace and class action litigation.
- Due to the immediate impact of the #MeToo Movement, numerous states revised their laws to incorporate additional protections, required employee training, or bar mandatory non-disclosure agreements.
- One clear legal effect of the #MeToo Movement can be seen in the EEOC's FY 2018 filings, which included 41 lawsuits asserting claims of sexual harassment

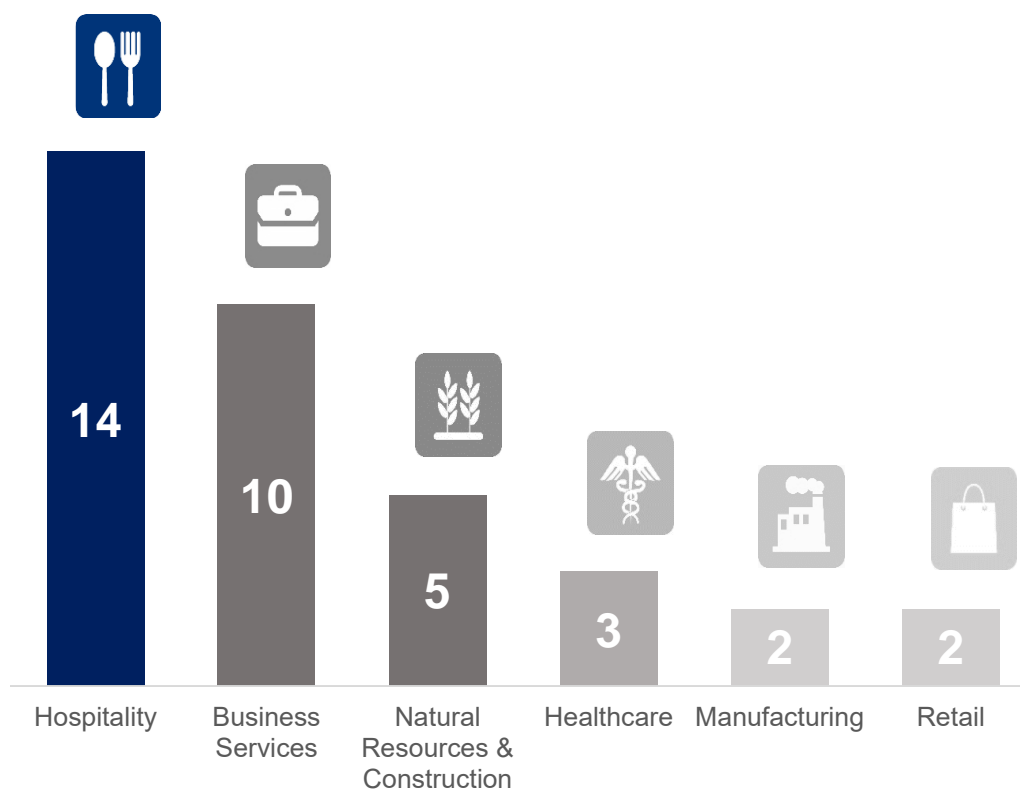
# EEOC Prioritizes Workplace Harassment



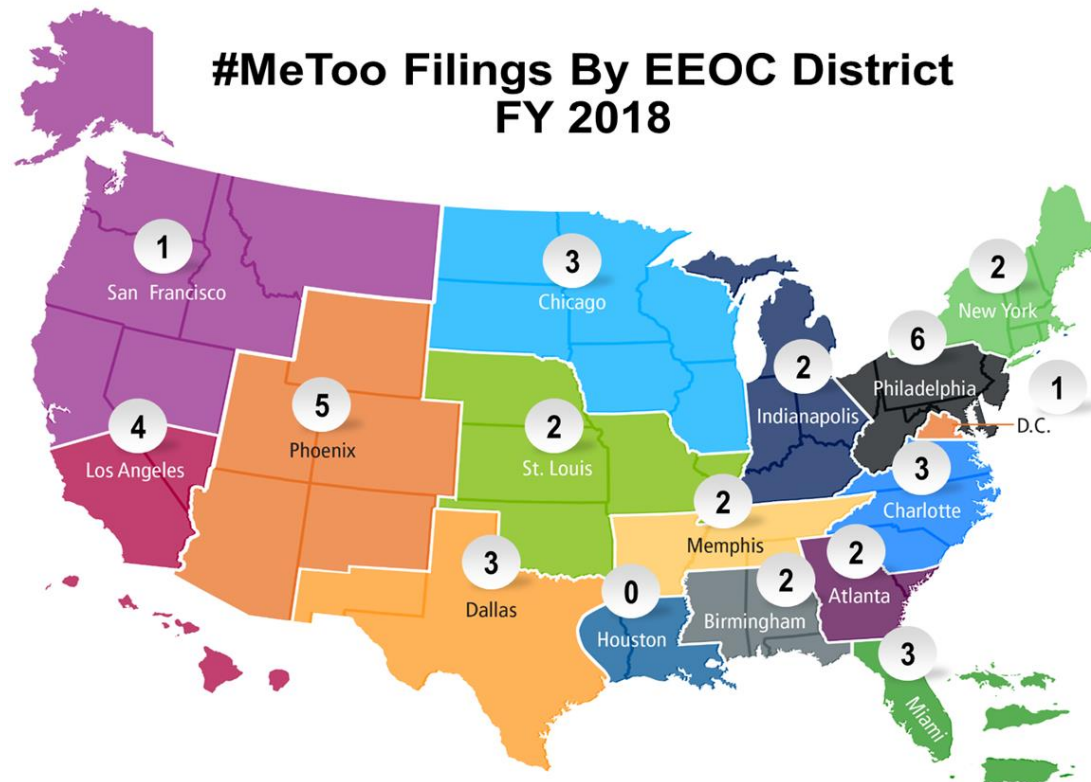
# EEOC Prioritizes Workplace Harassment

The hospitality industry has been the focus of many of the EEOC's largest and highest-profile workplace harassment lawsuits.

#MeToo Cases By Industry FY 2018



# EEOC Prioritizes Workplace Harassment



# EEOC Prioritizes Workplace Harassment

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## Select Task Force to Study Workplace Harassment

Created in January 2015, report published in June 2016

Goals:

- (1) reach more workers so they understand their rights
- (2) reach more employers to understand their challenges
- (3) promote best practices

January 2017 – EEOC issued a companion piece entitled Proposed Enforcement Guidance on Unlawful Harassment (“Proposed Guidance”)

# EEOC Prioritizes Workplace Harassment

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Since October 1, 2018 (the beginning of the EEOC's 2019 FY), the EEOC has filed six lawsuits alleging sexual harassment.

- Of these six cases, four were filed against restaurants and two were filed against retail stores.

During this same time period, the EEOC has also settled 11 sexual harassment cases, totaling \$2,473,000.

- Notable workplace harassment settlements in FY 2019 include:
  - \$700,000 settlement in the EEOC's case against multiple IHOP franchises.
  - \$675,000 settlement in *EEOC v. Atlantic Capes Fisheries, et al.*, a New Jersey-based shellfish harvester.

# Workplace Harassment/Discrimination Tips For Employers

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## Sharpen and redistribute written policies

- Clarify protections and conduct
- Emphasize non-retaliation provisions
- Separate direction to leaders and managers to model behavior and encourage reporting

## Ensure multiple wide-open reporting channels and robust response protocols

- Hotlines
- HR structures
- Open door options
- EEO coordinators
- Rapid response team and plan
- Stamping out gateway behavior



# Workplace Harassment/Discrimination Tips For Employers

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## Enhance training and pursue proactive reinforcement

- Create respectful workplace – culture through interactive and in-person consensus – building training for all employees
- Provide bystander intervention techniques and training for all employees
- Provide individual coaching for senior executives or managers “at risk”
- In person follow-up with complainants and accused

# *EEOC v. Marquez Brothers International, Inc., et al., No. 17-CV-44 (E.D. Cal.)*

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In January 2017, the EEOC filed suit against Marquez Brothers International, a California-based food distributor

The case alleged that Marquez Brothers favored less-qualified Hispanic job applicants over all other races

- Brought under Title VII as a race/national origin discrimination case

The company attempted to dismiss the matter in a number of way, but the case is still ongoing in California federal court

## **Lesson For Employers**

# *EEOC v. Rosebud Restaurants Inc., et al.*, No. 13-CV-6656 (N.D. Ill.)

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In September 2013, the EEOC filed suit against Rosebud Restaurants, a chain of Italian restaurants in the Chicago-area

Alleged a pattern or practice of race discrimination by the company's managers and owner

- The EEOC's investigation into the company's hiring practices led to the lawsuit

Settled in 2017 for \$1.9 million

- Rosebud's consent decree with the EEOC included a number of additional requirements

## **Lessons For Employers**

# *EEOC v. Catastrophe Management Solutions*, No. 13-CV-476 (S.D. Ala.)

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In September 2013, the EEOC filed suit against Catastrophe Management Solutions, an Alabama-based insurance claims company

Alleged race discrimination on behalf of an employee whose employment offer was rescinded after she refused to cut her dreadlocks

The company filed a motion to dismiss the claims, which the Court granted

- The Court held that hairstyle is a mutable characteristic, unlike skin color or hair texture

## **Lessons For Employers**

# *EEOC v. Consol Energy, Inc., et al.*, No. 13-CV-215 (N.D. W. Va.)

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In September 2013, the EEOC filed suit against Consol Energy, a Pennsylvania-based natural gas company

Alleged that Consol Energy failed to provide an employee with a religious accommodation by subjecting him to a biometric hand scanner for timekeeping purposes

- The employee argued that his personal information would be used by the Christian Anti-Christ, *i.e.* concern regarding the New Testament's "Mark of the Beast"

Initial jury verdict awarded the employee \$586,000 in damages

- The District Court denied the company's motion for a new trial, and the Fourth Circuit affirmed

## **Lessons For Employers**

# *EEOC v. Cost Containment Group Inc., et al.*, No. 14-CV-3673 (E.D.N.Y.)

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In June 2014, the EEOC filed suit against Cost Containment Group (“CGC”), a NY-based health network

Alleged that CGC discriminated against a group of former employees on the basis of a religion known as “Onionhead”

- Employees alleged that they were treated poorly, and eventually terminated, because of their “Onionhead” beliefs

The Court initially granted the EEOC’s motion for summary judgment, holding that “Onionhead” constituted a religion

- After a three-week jury trial, the employees were awarded \$5.1 million

## **Lessons For Employers**

# *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 09-CV-602 (N.D. Okla.)

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In September 2009, the EEOC filed suit against retailer Abercrombie & Fitch Stores, Inc.

Alleged that Abercrombie & Fitch violated Title VII when it failed to hire a job applicant because her hijab violated the company's "Look Policy"

- Thought by many to be the EEOC's highest-profile religious discrimination case

Court path: Summary judgment in the EEOC's favor in U.S. District Court → Complete reversal by Tenth Circuit, Summary judgment in the company's favor → U.S. Supreme Court rules 8-1 in favor of the EEOC in June 2015

## **Lessons For Employers**

# Update on Pay Equity Issues

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The Equal Pay Act was enacted by Congress in 1963.

The EPA prohibits employers from discriminating “*between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions...*”

This statute overlaps with Title VII of the Civil Rights of 1964 (“Title VII”) in terms of prohibiting sex discrimination, but also differs in important ways.



## Equal Pay Act

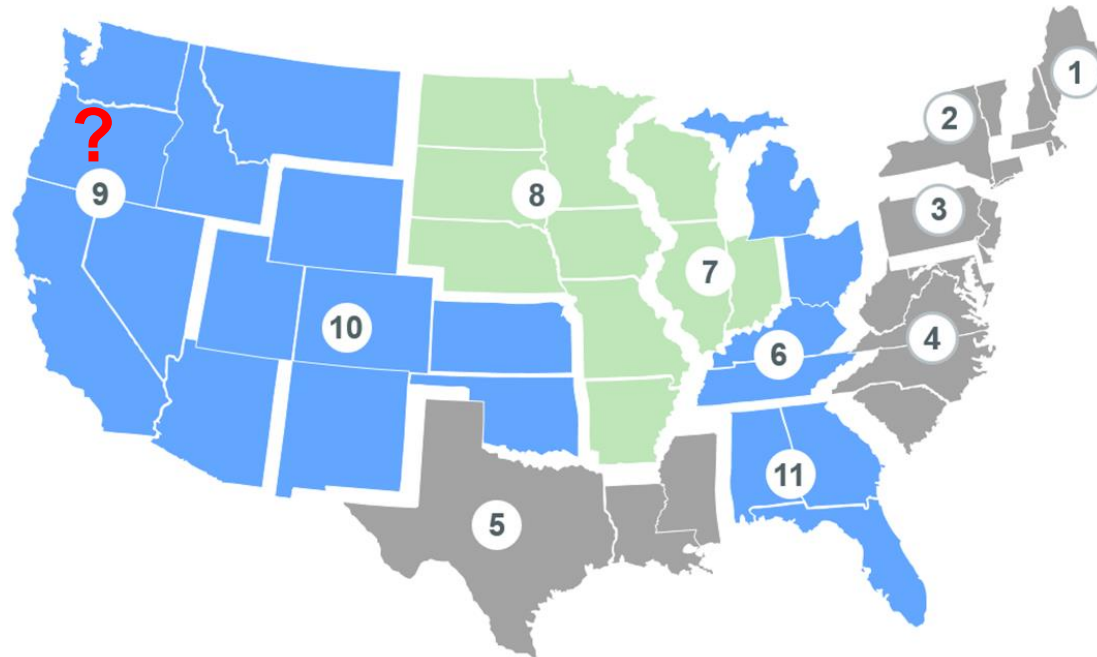
VS.


## Title VII


- Sex
  - Compares employees whose jobs require equal skill, effort, and responsibility, and are performed under similar working conditions
  - Comparators must be in same establishment
  - Seniority, merit, quantity or quality of production or any other factor other than sex
  - Akin to strict liability
  - No Exhaustion: Can go directly to Court or file with the EEOC
  - Collective proceedings limited to those who affirmatively choose to join the suit
- Sex, race, color, national origin, religion + age and disability (ADEA and ADA)
  - Compares employees who are similarly situated
  - Comparators need not be in same establishment (but must be similarly situated)
  - Non-discriminatory factors
  - Requires proof of intentional discrimination (can use statistics)
  - Exhaustion: Must file with EEOC
  - Follows Rule 23 class action procedures

# History under the Federal Equal Pay Act

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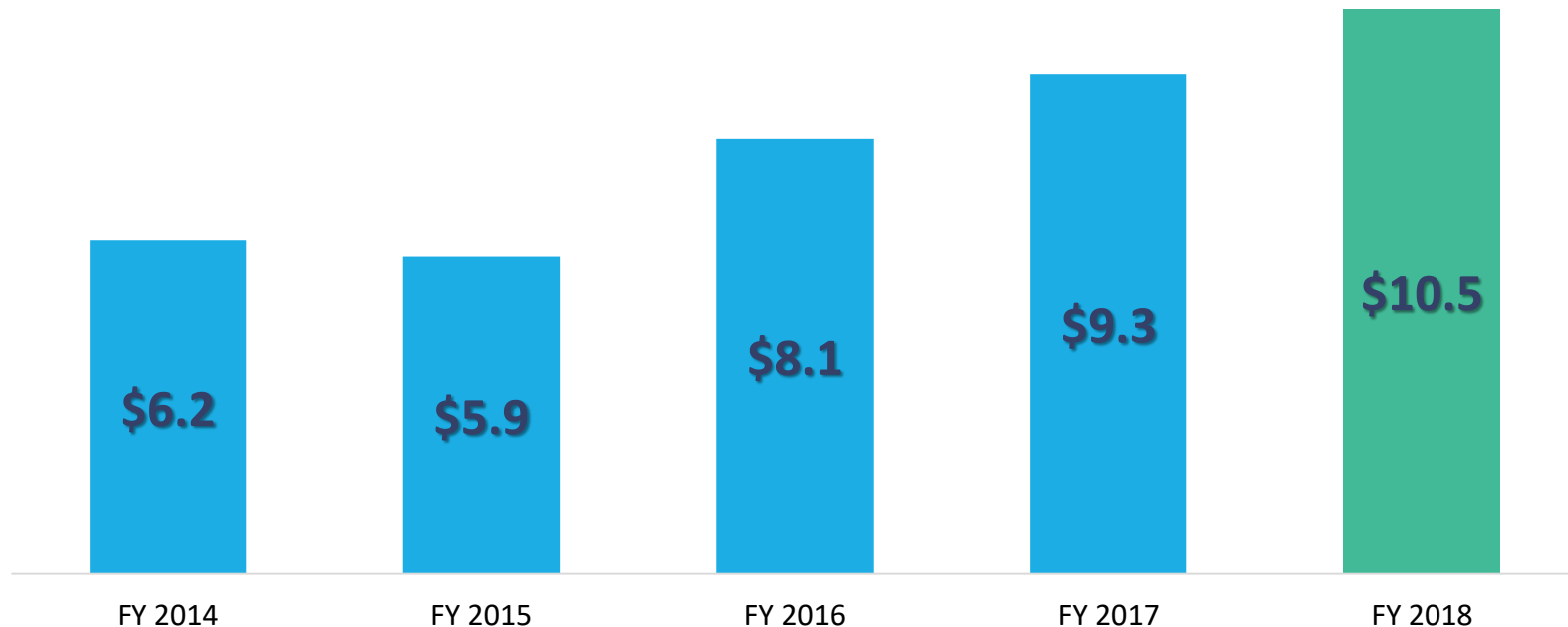
 The use of prior salary, standing alone, **DOES justify** a salary disparity

 The use of prior salary, standing alone, **DOES NOT justify** a salary disparity

# EEOC Enforcement of the Equal Pay Act

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## Settlement of Equal Pay Charges FY 2014 - 2018 (in millions)



# EEOC CHARGE AND ENFORCEMENT DATA

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The EEOC received 7,609 sexual harassment charges in 2018 - a 13.6 percent increase from FY 2017 - and obtained \$56.6 million in monetary benefits for victims of sexual harassment.

[EEOC 4-10-19 Press Release]

# Percentage of Charges Filed by Claim Type

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Retaliation: 39,469 (51.6 percent of all charges filed)

Sex: 24,655 (32.3 percent)

Disability: 24,605 (32.2 percent)

Race: 24,600 (32.2 percent)

Age: 16,911 (22.1 percent)

National Origin: 7,106 (9.3 percent)

Color: 3,166 (4.1 percent)

Religion: 2,859 (3.7 percent)

Equal Pay Act: 1,066 (1.4 percent)

Genetic Information: 220 (.3 percent)

These percentages add up to more than 100 because some charges allege multiple bases.

[EEOC 4-10-19 Press Release]

# EEOC – HARASSMENT A SUBSTANTIVE AREA OF PRIORITY FOR FISCAL YEARS 2017-2021

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- Focus on Systemic Harassment
- EEOC received \$16 Million increase in budget fueled by Me-Too movement.

# Illinois Attorney General

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- The Illinois Attorney General will investigate (by subpoena) and file suit under the Illinois Human Rights Act if it believes that it has found evidence of systemic discrimination or harassment. 775 ILCS 5/10-104
- Although the authorizing statute provides, (I believe), a rights to recover a total of no more than \$10,000 against a defendant not previously adjudged to have violated a provision of the Act pertaining to employment, the AG's office claims a right to recover \$10,000 per instance of harassment.

# ILLINOIS SEXUAL HARASSMENT AND DISCRIMINATION HOTLINE

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- Illinois Human Rights Act was amended in February 16, 2018 to provide a hotline for individuals to anonymously report sexual harassment.
- Through the hotline, the IDHR assists individuals finding resources, filing complaints and may recommend that the individual retain counsel.



# New and Proposed New Me-Too Laws

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- Sexual harassment settlement agreements that have confidentiality requirements are no longer tax deductible under Tax Cuts and Jobs Act. [Effective since December, 2017].
- Illinois Workplace Transparency Act -- would restrict use of non-disclosure agreements as to sexual harassment and discrimination claims (would not prohibit confidentiality in settlement agreements). [Introduced 1/19 currently in committee].
- Restaurant Anti-Harassment Training [Introduced 2/19 currently in Committee]

# What is Sexual Harassment

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- Tit for Tat – *Quid Pro Quo*
- Sexual touching or lewd statements, repeated requests for dates
- The (inappropriate) jokester
- Sexist/gendered comments (think labels such as emotional, shrill, hysterical, sweetheart etc.)

# CONSENSUAL? (at some point)

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Workplace dating/romantic/intimate relationships

- 16 % of people meet their spouse at work

“Work spouse” platonic (?) intimacy (70% of professionals have had a work spouse; 7% have crossed the line. (2017 Captivate study))

# Employer Liability

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Don't look the other way!

- Under the Illinois Human Rights Act, employers are strictly liable for the acts of a supervisor or manager even if the supervisor or manager has no authority over the plaintiff/complainant. *Sangamon County Sheriff's Depart. v. Illinois Human Rights Commission*, 233 Ill. 2d 125 (2009) (interpreting 775 ILCS 2-102(D)). (Stricter standard than under Title VII Farragher/ Ellerth liability)
- While Title VII applies only to employers with 15 employees, BUT Illinois employers of only 1 employee are covered under the Illinois Human Rights Act with respect to sexual harassment.

# NOT JUST HUMAN RIGHTS STATUTES

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## Other State Statutes

- Gender violence act (Illinois)

## And Under Common Law (if employer is aware of conduct and does nothing to stop it)

- Intentional infliction of emotional distress
- Battery

# INDIVIDUAL LIABILITY OF ACCUSED?

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Not under Title VII but YES under Illinois Human Rights Act

Also, individual liability for:

- Intentional infliction of emotional distress;
- Battery
- Illinois Gender Violence Act

# WHAT TO DO?

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- Policies
- Consistent and Fair Enforcement of Policies
- Training

## Critical Race Theory: Primary Purpose

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- Understand the creation and maintenance of White supremacy in the United States.
- Not only to understand the relationship between race and law but also to change it.
- However, we are not a legal institution!



## Critical Race Theory In Education

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Sleeter and Bernal (2004) point out, “One might think of CRT in education as a developing **theoretical, conceptual, methodological, and pedagogical strategy** that accounts for the role of race and racism in U.S. education and works toward the elimination of racism as part of a larger goal of eliminating other forms of subordination” (245).

# Key Assumptions of CRT

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Race is a socially constructed product of social thought and relations.

Racism is normal, ordinary, and ingrained into society.

Traditional claims of neutrality, objectivity, and colorblindness must be contested to reveal the self-interests of dominant groups.

The experiential knowledge of communities of color is valid, legitimate, and critical toward understanding the persistence of racial inequality/inequity.

# Key Assumptions of CRT

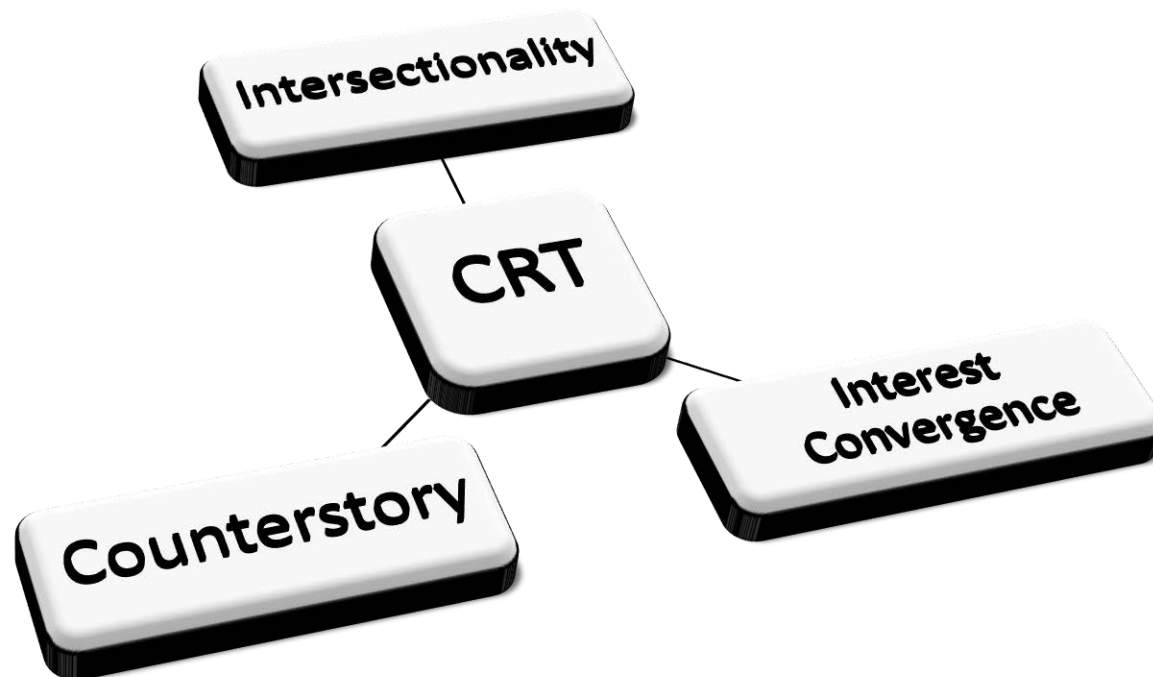
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Communities of color are differentially racialized depending on the interests of the dominant group.

Historical contexts must be considered in order to challenge policies and practices that affect people of color.

# CRT Theoretical and Methodological Frameworks

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## Counterstory

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- Technique and tool for analysis
- Challenges dominant narratives
- Ensures the voice of the racially marginalized is heard.

# Intersectionality

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- Coined by Kimberle Crenshaw
- Used in contexts of violence against women and affirmative action policies
- Explores how aspects of identity **mix and collide** to create experiences that are not easily identified in dominant discourses of identity.
- “[F]ocus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed...” (1991, p. 1245)



# Interest Convergence

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Coined by legal scholar Derrick Bell (1980).

Simply defined as racially progressive decisions are never made by the dominant group (White folks in this case) unless the decision fits their own group interests.

Bell used the Brown v. Board of Education (1954) decision to highlight...

# Interest Convergence cont...

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## Brown v. Board of Education (1954)

- Reversed the Plessey v. Ferguson decision (1896)
- Brown lawyers argued Black schools were not equal to White schools, violating the 14<sup>th</sup> Amendment.

But remember, there is always a larger context going on and multiple things happen at the same time!



# Interest Convergence cont.

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## Other Factors Weighing on the Case

Advancing America's Cold War objectives (can't talk about being the land of liberty when promoting segregation)

Possible domestic racial unrest as Black GIs returning from WWII were met with continued discrimination and other problems

Southern segregation was a barrier to national economic growth

Another example is affirmative action

# Session Three – The Future

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Where Should We Go and How Do We Get There?



# The Benefits of Diversity in Your Law Practice

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The United States is diverse. Your clients and potential clients are likely diverse. A firm that lacks diversity may not project well.

- House counsel is likely diverse;
- Business owners are diverse;
- Individuals seeking personal injury, family law or estate planning services are diverse;
- Public sector clients are diverse.

# Diversity and the Glass Ceiling

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- It is not difficult to find a qualified newly licensed minority or female lawyer to join your firm;
- Development and growth are important too:
  - Including minorities and women in casual and formal office events
  - Introducing minorities and women to clients and inviting to client dinners and events

# Me-Too Backlash

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- The media and social media have characterized accusations as fact giving rise to fear that a claim will ruin a career without a fair opportunity to be heard;
- This concern of false or exaggerated accusations may discourage invitations to women or minority employees to firm events or even casual after work meals or drinks;
- False or exaggerated claims can seriously damage a career. However, sound policies and training will diminish or eliminate these risks:

# WHAT TO DO?

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Policies

Consistent and Fair

Enforcement of Policies

Training

# POLICIES

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## Sex Harassment/Anti-Retaliation

- A. General EEO Statement (include in ads for attorneys)
- B. Harassment Policy with clear reporting mechanism
- C. Clear Anti-Retaliation Policy
- D. Have Employees Sign Separate Harassment Policy Acknowledgement

# POLICIES (cont'd)

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- No dating policies are difficult to enforce; consider “love contracts”
- No pornography policy
  - Include no expectation of privacy in employer electronic devices and email policies
  - You may lose exceptional female lawyers (and other sensitive employees) if you have attorneys watching/joking about a pornographic image or video (and be sued)



# POLICIES (cont'd)

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- “Political correctness” is actually not a bad idea in a professional workplace.

- May lose tremendous talent with “jokes” that include stereotypes, slurs, offensive or derogatory language about a person’s race, color, national origin, sexual identity or orientation or appearance;

- You may think you can joke with someone about something and accidentally seriously offend the individual;

- Don’t think a “door has been opened.”

# ENFORCE POLICIES

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- Policies are important but enforcement is too
- If you have an employee who has violated your anti-harassment and discrimination policies do not look the other way
  - Class action lawsuit filed by former female equity partner against Ogletree. Complaint claimed, equal pay violations, discrimination in firm opportunities and retaliation. Claimed that female attorneys are disproportionately saddled with administrative duties and discriminatorily assigns origination credit to male attorneys.
  - Ogletree also facing a sexual harassment claim filed by a gay staff attorney against a partner. The plaintiff claims that he was shown explicit photos and videos by a partner who wanted to have sex with him. After he complained, he alleges the partner stopped giving him work. Claims he was referred to as the “unicorn.”
  - Proskauer Rose is the defendant in a lawsuit filed by the former head of the firm’s labor and employment practice in Washington claiming that she was paid millions of dollars less per year than male partners who were similarly or less productive. She also claimed that she was subjected to objectifying and sexual comments.

# Proactive Measures

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Consider a diversity committee

Consider involvement with local minority bar associations

Consider mentoring a minority law student

# Implicit Bias in the Workplace

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Leads to favoring individuals who are “one of us” or most similar to ourselves

Can lead to hiring, promoting, and valuing individuals who are a cultural match rather than most qualified

Likeness to ourselves also associated with increased trust and respect

Shows up most when we are under stress

# Debiasing Interventions

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Awareness education about implicit bias

Intergroup contact

Deliberative processing – (how do we think about and treat others)

Perspective thinking – (what might be a stereotype used about you)

Counter-stereotype training – (retrain associations)

Counter-stereotyping imagining – (contradictions)

Policy Change

Accountability – (Call each other out: expectations)

Individuation – (Gather specific information about individuals/situations)

-Susan Naimark

5/16/2019

# Town Hall Conversation on Diversity and its Impacts on the Legal Profession

Jennifer Adams Murphy

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WESSELS SHERMAN

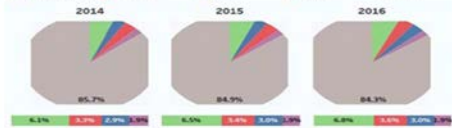
## I. WHERE ARE WE GOING AND HOW DID WE GET HERE?

### A. History and Progress

#### THE HISTORICALLY WHITE MALE PROFESSION

##### The Racial And Ethnic Makeup Of Law Firms

The legal industry shows little progress on diversity in recent years.



LAW 360 2017 DIVERSITY SNAPSHOT

Law firms do not reflect attorney demographics-

There is improvement but the improvement is slow.

#### Diversity: Changing Slowly

##### Diversity Stagnates At US Firms

The proportion of minority attorneys grew by less than a percentage point in 2017.

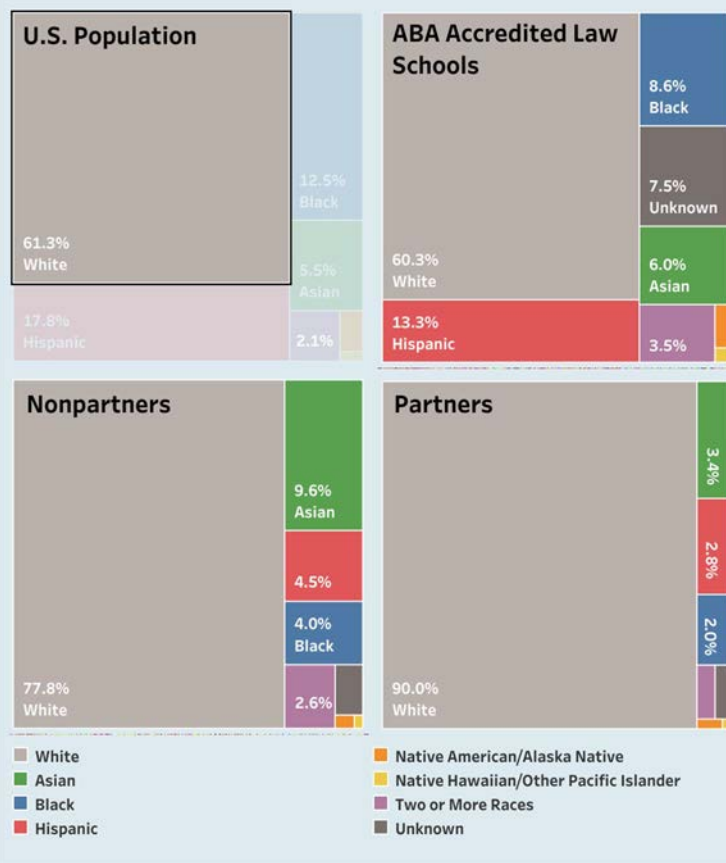


LAW 360 2018 DIVERSITY SNAPSHOT

## Law School to Partnership Diversity Decreases

### At Higher Levels, Lower Diversity

The ranks of minorities shrink on the path from law student to law partner.



While increased diversity in law firms may seem frustratingly slow, it was not long ago (mid-20<sup>th</sup> century) when women were not admitted to law schools and African Americans were not admitted to top law schools in the South. In fact, some of us were alive when law schools excluded minorities and women.

- 1869 First African American Graduate from Harvard Law School;
- *Sipuel v. University of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950). U.S. Supreme Court rules that African Americans must be admitted to white law schools;
- Harvard Law School did not admit women until 1950;
- Notre Dame Law School did not admit women until 1966;
- 2003 Harvard Law School had its first female dean;

The fact that law schools are far more diverse and that minority positions of influence in firms is improving is reassuring. A review of decisions regarding female and minority admissions to law school and the bar gives context to the great strides that have been made. *Bradwell v. State*, 83 U.S. 130 (1873) and *In re Application of Bradwell*, 55 Ill. 535 (1886) (women not admitted to Illinois bar ó interesting reads); *Sweatt v. Painter*, 339 U.S. 629 (1950) (African American appealed case to U.S. Supreme Court to gain admission to University of Texas Law School).

#### B. **Diversity does not Mean Affirmative Action**

To embrace diversity is not to prefer one race, national origin, religion, disability status, gender, sexual orientation or identity to another.

Diversity does not require preference of a less qualified candidate in favor of a candidate that is a member of a protected group.

To improve diversity requires questioning the possible existence of implicit bias and thinking about the advantages a more diverse practice can bring.

- *Regents of University of California v. Bakke*, 438 U.S. 265 (1977)(sharply divided Supreme Court strikes down UC Medical School's affirmative action minority set aside);
- *Grutter v. Bollinger*, 538 U.S. 306 (2003) (Supreme Court distinguishes *Bakke* and upholds University of Michigan's consideration of race variously in connection with its race conscious admissions program)



## II. THE PRESENT – ME-TOO AND YOU

A. **Me-Too** - contagious social movement that has substantially reduced tolerance for locker room behavior and boy will be boys attitudes.

Although the EEOC notes that the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). However, in today's social climate, simple teasing offhand comments and isolated incidents are likely to trigger an EEOC claim and possibly a lawsuit.

B. **Enforcement**

### EEOC CHARGE AND ENFORCEMENT DATA

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The EEOC received 7,609 **sexual harassment charges** in 2018 - a 13.6 percent increase from FY 2017 - and obtained \$56.6 million in monetary benefits for victims of sexual harassment.

[EEOC 4-10-19 Press Release]

### Percentage of Charges Filed by Claim Type

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Retaliation: 39,469 (51.6 percent of all charges filed)  
 Sex: 24,655 (32.3 percent)  
 Disability: 24,605 (32.2 percent)  
 Race: 24,600 (32.2 percent)  
 Age: 16,911 (22.1 percent)  
 National Origin: 7,106 (9.3 percent)  
 Color: 3,166 (4.1 percent)  
 Religion: 2,859 (3.7 percent)  
 Equal Pay Act: 1,066 (1.4 percent)  
 Genetic Information: 220 (.3 percent)  
 These percentages add up to more than 100 because some charges allege multiple bases.

[EEOC 4-10-19 Press Release]

- Systemic harassment an area of priority for EEOC for fiscal years 2017-21.
- Illinois Attorney General will investigate harassment and discrimination under 75 ILCS 5/10-104. (Note: While the authorizing statute appears to provide a right to recover a total of no more than \$10,000 against a defendant charged with violation of employment discrimination laws where the defendant has not previously adjudged to have violated a provision that section of the Act (this interpretation is supported by legislative history) the AG's office claims a right to recover \$10,000 per instance of harassment. There is no interpretive decision).

### C. Recognizing and Preventing Harassment

1. Title VII and the Equal Employment Opportunity Commission define sexual harassment as:

*Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made wither explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive working environment.*

29 CFR §1604.11.

2. General types of harassment:

Tit for Tat ó *Quid Pro Quo*

Sexual touching or lewd statements, repeated requests for dates

The (inappropriate) jokester

ōSharingō inappropriate photos, YouTube videos etc.

Sexist/gendered comments (think labels such as emotional, shrill, hysterical, sweetheart etc.)

3. Potential Minefields:

Workplace dating/romantic/intimate relationships (16% of people meet their spouse at work) Consider ōLove Contractö

Work spouseö platonic (?) intimacy (70% of professionals have had a work spouse; 7% have crossed the line. (2017 Captivate study))

## **D. Liability**

### **1. Employer Liability**

Under the Illinois Human Rights Act, employers are strictly liable for the acts of a supervisor or manager even if the supervisor or manager has no authority over the plaintiff/complainant. *Sangamon County Sheriff's Depart. v. Illinois Human Rights Commission*, 233 Ill. 2d 125 (2009) (interpreting 775 ILCS 2-102(D)). (Stricter standard than under Title VII Farragher/ Ellerth liability)

Title VII applies only to employers with 15 employees, BUT Illinois employers of only 1 employee are covered under the Illinois Human Rights Act with respect to sexual harassment.

Other State Statutes:

- Gender violence act (Illinois)
- And Under Common Law (if employer is aware of conduct and does nothing to stop it)
- Intentional infliction of emotional distress
- Battery

### **2. Individual Liability**

Not under Title VII but YES under Illinois Human Rights Act  
Also, individual liability for:

- Intentional infliction of emotional distress
- Battery
- Illinois Gender Violence Act

## **E. New and Proposed Me-Too Responsive Laws and Initiatives**

- Sexual harassment settlement agreements that have confidentiality requirements are no longer tax deductible under Tax Cuts and Jobs Act. [Effective since December, 2017].
- Illinois Workplace Transparency Act -- would restrict use of non-disclosure agreements as to sexual harassment and discrimination claims (would not prohibit confidentiality in settlement agreements). [Introduced 1/19 currently in committee].
- Restaurant Anti-Harassment Training [Introduced 2/19 currently in Committee]

### III. WHERE DO WE GO FROM HERE

#### A. The Benefits of Developing a Diverse Law Firm

The United States is diverse. Your clients and potential clients are likely diverse. A firm that lacks diversity may not project well.

- House counsel is likely diverse;
- Business owners are diverse;
- Individuals seeking personal injury, family law or estate planning services are diverse;
- Public sector clients are diverse.

#### B. Diversity and the Glass Ceiling

- It is not difficult to find a qualified newly licensed minority or female lawyer to join your firm;
- Development and growth are important too:

Including minorities and women in casual and formal office events

Introducing minorities and women to clients and inviting to client dinners and events

#### C. Me-Too Backlash

- The media and social media have characterized accusations as fact giving rise to fear that a claim will ruin a career without a fair opportunity to be heard;
- This concern of false or exaggerated accusations may discourage invitations to women or minority employees to firm events or even casual after work meals or drinks;
- False or exaggerated claims can seriously damage a career. However, sound policies and training will diminish or eliminate these risks.

#### D. Developing Diversity and Minimizing Harassment and Discrimination Claims

##### 1. Don't be a Cobbler Without Shoes!

Develop:

- Policies
- Consistent and Fair Enforcement of Policies
- Training

## 2. Policy Development

- Sex Harassment/Anti-Retaliation
  - General EEO Statement (include in ads for attorneys)
  - Harassment Policy with clear reporting mechanism
  - Clear Anti-Retaliation Policy
  - Have Employees Sign Separate Harassment Policy Acknowledgement
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- "Political correctness" is actually not a bad idea in a professional workplace.
  - May lose tremendous talent with "jokes" that include stereotypes, slurs, offensive or derogatory language about a person's race, color, national origin, sexual identity or orientation or appearance;
  - You may think you can joke with someone about something and accidentally seriously offend the individual;
  - Don't think a "door has been opened."

3. Enforce Policies Consistently and Uniformly

- Policies are important but enforcement is too
- If you have an employee who has violated your anti-harassment and discrimination policies do not look the other way

4. Training

- New Hires
- Annually
- Consider post-harassment test
- Consider separate training for management and staff

E. **PROACTIVE MEASURES**

Consider a diversity committee

Consider involvement with local minority bar associations

Consider mentoring a minority law student