

# 2020 Legal Update

Presented by:

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# Agenda

1. Unemployment Compensation
2. Employee Leave in 2020
3. COVID-19 and Anti-Discrimination Laws
4. New Title IX Regulations

# Unemployment Compensation

# Unemployment Compensation

- Employers must generally pay for unemployment insurance when:
  - A former employee worked for the employer long enough to meet the basic legal requirements; and
  - Separation from employment is not the fault of the person who is unemployed; and
  - The person is able to work, available for work, and actively seeking suitable work.
- You may be partially liable for unemployment insurance if an employee is laid off from another part-time job, even if the employee continues to work for you.

# Employee Leave in 2020

# Employee Leave in 2020

- Types of Leave Available to Employees in 2020:
  - Accrued Paid Leave under Employment Contract and/or Policy.
  - Regular Family and Medical Leave Act (FMLA).
  - Unpaid Leave under ORC 3319.13.
  - New Types of Leave Available between April 1 and December 31, 2020:
    - Emergency Paid Sick Leave Act (EPSLA).
    - Emergency Family and Medical Leave Expansion Act (EFMLEA).

# Employee Leave in 2020: Accrued Leave

- Review collective bargaining agreements, other employee contracts, and policies.
- Conditions required for use of leave? (E.g., employees may only take sick leave if they are currently sick.)

# Employee Leave in 2020: FMLA Leave

- Employees are eligible for leave under the FMLA if they:
  - Work for a covered employer (schools are covered employers).
  - Have worked for the employer for at least 12 months as of the date leave will begin.
  - Have at least 1,250 hours of service during the 12-month period preceding the leave.
  - Work at or within 75 miles of a location that employs at least 50 employees.
- Employees are eligible for up to 12 weeks of unpaid leave per year.



# Employee Leave in 2020: FMLA Leave

- Eligible employees qualify for FMLA leave if they request leave for any of the following reasons:
  1. The birth of a child and/or to bond with a child within a year of birth.
  2. The placement of a child for adoption or foster care and/or to bond with a foster or adopted child within a year of birth.
  3. A serious health condition that makes the employee unable to perform the functions of the job.
  4. To care for the employee's spouse, son, daughter, or parent who has a serious health condition.
  5. Any qualifying exigency arising out of the employee's family member's military service.

# Employee Leave in 2020: FMLA Leave

- When an employee requests FMLA leave, the employer must:
  - Determine employee eligibility and provide a Notice of Eligibility and Rights & Responsibilities.
  - Designate the leave as FMLA Leave and send the employee a Designation Form.
  - Place the employee on unpaid leave (unless the employee will substitute accrued paid leave) and continue to provide health insurance benefits.
  - Return the employee to work when the leave is over.

# Employee Leave in 2020: ORC 3319.13

- Boards of education may grant employees an unpaid leave of absence for up to two years for any reason.
- Boards must grant an unpaid leave of absence when the employee requests leave because of illness or disability.
- Boards of education may place an employee on unpaid leave without an employee request, but must provide the employee a hearing.

# Employee Leave in 2020: FFCRA

- Families First Coronavirus Response Act (FFCRA).
  - Emergency Paid Sick Leave Act (EPSLA).
  - Emergency Family and Medical Leave Expansion Act (EFMLEA).
- Not Permanent: Only effective between April 1 and December 31, 2020.
- Notice Requirement: As of April 18, employers are required to physically or electronically post a notice regarding the FFCRA paid leave provisions.  
([https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf))

# Employee Leave in 2020: EPSLA

- All employees are eligible for up to 2 weeks of paid leave under the EPSLA.
  - “Full-time” employees are eligible for up to 80 hours of leave.
  - “Part-time” employees’ eligibility for leave is prorated.

# Employee Leave in 2020: EPSLA

- Eligible employees qualify for EPSLA leave if they are unable to work or telework because:
  1. They are subject to a quarantine or isolation order related to COVID-19.
  2. A health care provider has advised them to self-quarantine due to concerns related to COVID-19.
  3. They have COVID-19 symptoms and are seeking a medical diagnosis from a health care provider.
  4. They are caring for an individual described in (1) or (2).
  5. They are caring for a child whose school or daycare is closed or unavailable because of COVID-19, and no one else is available to care for the child.
  6. They have a “substantially similar condition.”

# Employee Leave in 2020: EPSLA

- When an employee requests EPSLA leave, the employer must:
  - Require the employee to provide sufficient information for the employer to determine leave is requested for a qualifying reason. (Consider developing or using an EPSLA Leave Request Form).
  - Accept requests for leave orally or in writing, from the employee's "spokesperson," and up to the end of the first day of leave if the leave was not foreseeable.
  - Place the employee on partially or fully paid leave for up to 2 weeks and maintain the employee's health insurance. The applicable rate of pay depends on the qualifying reason for leave.
  - Return the employee to work when the leave is over.

# Employee Leave in 2020: EFMLEA

- Employees are eligible for leave under the EFMLEA if they have been employed for at least 30 calendar days. (Different from regular FMLA.)
- Amount of Leave Eligibility:
  - Employees are eligible for up to 12 weeks of EFMLEA between April 1 and December 31, 2020.
  - Entitlement to leave under the EFMLEA and the FMLA is combined, not cumulative – 12 weeks total for both kinds of leave.
  - EFMLEA leave entitlement is limited to 12 weeks, even if the period in which EFMLEA is available spans 2 FMLA years.



# Employee Leave in 2020: EFMLEA

- Eligible employees qualify for EFMLEA leave if they are unable to work or telework because:
  - They need to care for their child whose school or daycare has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19.
  - No other suitable person is available to care for the employee's child during the period of such leave.

# Employee Leave in 2020: EFMLEA

- When an employee requests EFMLEA leave, the employer must:
  - Follow FMLA notice and designation procedures.
  - Require the employee to provide sufficient information to determine leave is requested for a qualifying reason.
  - Place the employee on unpaid leave for the first 2 weeks of leave, then provide partially paid leave for up to 10 weeks. Continue to provide the employee health insurance benefits throughout the leave.
  - Return the employee to work when the leave is over.

# Employee Leave in 2020: EPSLA and EFMLEA

- Is substitution of accrued paid leave permitted under the EPSLA and EFMLEA?
  - The employee and employer may agree to substitute applicable accrued paid leave for unpaid portions of EPSLA Leave.
  - The employee and employer may agree to substitute applicable accrued paid leave or EPSLA Leave for the first 2 weeks of EFMLEA Leave, which are otherwise unpaid.
  - The employer may require substitution of accrued paid leave for the partially paid portion of EFMLEA Leave (the last 10 weeks).
- Is intermittent leave permitted under the EPSLA and EFMLEA?
  - Only if the employer and employee agree (like regular FMLA).
  - Leave from reporting to work: Only to care for a child whose school or daycare is closed.
  - Leave from telework: For any reason with employee-employer agreement.

# Employee Leave in 2020: Scenarios

- It's September, and a second-year teacher wants to take leave to care for her son, age 7, whose school is closed because of COVID-19. The teacher's spouse works full time and will not be taking leave to care for the child. What do you do?
  - EFMLEA leave?
  - EPSLA leave?
  - Accrued paid leave?
  - FMLA leave?
  - ORC 3319.13 leave?

# Employee Leave in 2020: Scenarios

- A bus driver asks for leave because she is afraid of contracting COVID-19 if she comes to work, but does not submit a doctor's note or isolation order, and is not currently suffering from symptoms of COVID-19. What do you do?
  - EFMLEA leave?
  - EPSLA leave?
  - Accrued paid leave?
  - FMLA leave?
  - ORC 3319.13 leave?

# Employee Leave in 2020: Scenarios

- A custodian asks for leave after submitting a form doctor's note that says he "has chronic high-risk medical conditions and would benefit from self-quarantine." The employee is not currently suffering from symptoms of COVID-19. What do you do?
  - EFMLEA leave?
  - EPSLA leave?
  - Accrued paid leave?
  - FMLA leave?
  - ORC 3319.13 leave?
  - Americans with Disabilities Act (ADA)?

# COVID-19 and Anti-Discrimination Laws

# The Equal Employment Opportunity Commission (EEOC)

- The EEOC enforces workplace anti-discrimination laws, including the following COVID-19 relevant laws:
  - The Americans with Disabilities Act (ADA)
  - The Rehabilitation Act
  - Title VII of the Civil Rights Act
  - The Age Discrimination in Employment Act (ADEA)
  - The Genetic Information Nondiscrimination Act (GINA)



# EEOC Guidance

- *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*
  - Updated March 19, 2020
- *What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws*
  - Updated May 7, 2020

# The ADA's Relevance to the Pandemic

- **ONE**: It regulates an employer's disability-related inquiries and medical examinations for all employees, including those who do not have disabilities.
- **TWO**: It prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat."
- **THREE**: It requires reasonable accommodations for individuals with disabilities.

# The ADA: Summary

- Prohibits employment discrimination against an individual with a disability.
- To be protected under the ADA—Disabled and Qualified:
  - Disability
    - Someone with a physical or mental impairment that substantially limits one or more major life activities. [or “record of” or “regarded as”]
      - Is Coronavirus a Disability?
      - Substantially limiting: short term conditions?
  - Qualified
    - Someone that has the requisite skills, experience, education and license and is able to perform the essential functions of the job with or without a reasonable accommodation.

# The ADA: Medical Questions & Exams (The Employment Stage)

- FIRST: whether the employer is even asking a “disability-related” question or requiring a “medical” examination.
  - “Do you have a compromised immune system?”
  - “Do you have flu-like symptoms?”
- IF NO: Not an ADA issue, and we can ask.
- IF YES: The ADA permits if “job related and consistent with business necessity.”
  - When an employer has a reasonable belief, based on objective evidence, that 1) an employee’s ability to perform the essential job functions will be impaired by a medical condition; or 2) an employee will pose a direct threat due to a medical condition.
  - If the employee requests an accommodation.

# The ADA: Direct Threat

- An employer may ask medical questions and require medical examinations if an employee will pose a direct threat.
- An employer may exclude someone from a job if that person would pose a “direct threat” to health or safety.
  - That the individual poses a “significant risk” of “substantial harm” to the individual or others, and that there is no reasonable accommodation that would reduce the risk of harm below that level.
- EEOC: An individual with COVID-19 will pose a direct threat to the health of others “at this time.”
  - Based on current guidance, the facts demonstrate that a significant risk of harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time.

# The ADA: Reasonable Accommodations

- RAs: the removal of workplace barriers so an employee can do his job.
  - Examples: acquiring or modifying equipment; job restructuring (marginal versus essential functions); reassignment to a vacant position; telework; leave (versus indefinite leave).
- The Interactive Process:
  - Ask questions to determine whether the condition is a disability;
  - Discuss with the employee how the requested accommodation would assist him and enable him to keep working/perform essential functions;
  - Explore alternative accommodations that may effectively meet his needs;
  - Request medical documentation if needed.
- Accommodations during the pandemic:
  - Consider short-term accommodations; consider accommodations you may not grant under normal circumstances. DOCUMENT.
- Undue Hardship: Does the RA cause an undue hardship to the employer?

# The ADA: Confidentiality of Medical Information

- Medical information must be kept confidential. There are limited exceptions, including:
  - Supervisors may be told about necessary restrictions on work or duties of the employee and about necessary accommodations.
    - Make sure there is a valid reason for supervisor to know.
- Questions from coworkers: give your supervisors a script.
  - Employee tests positive for COVID-19, “Who is it?”: “It is private information and I can’t tell you. And I wouldn’t share your information with your coworkers.”
  - Employee is given a reasonable accommodation, “Why does Sue get to...”: “We are acting for a legitimate business reason or in compliance with federal law.”
- Keep medical information separate from personnel files
- Safeguard at home.

# COVID-19 Related Harassment Due to National Origin and Race

- It is against federal law to harass or otherwise discriminate against employees and coworkers based on race, national origin, color, sex, religion, age, disability, or genetic information.
- Employer should immediately review any allegations of harassment or discrimination and take appropriate action.



# Questions and Answers

COVID-19 and Anti-Discrimination Laws

## Q&A: *Disability-Related Questions and Exams*

1. An employee calls in sick during the pandemic, can I ask him about symptoms like a cough or fever?
  - Yes. You may ask the employee if they are experiencing symptoms of COVID-19 per the CDC list of symptoms (current): fever, cough, shortness of breath, sore throat, muscle pain, chills, and/or new loss of taste or smell.
2. Can we take an employee's temperature at work? Yes.
3. Can we require employees to take an antibody test? Very risky.
4. Can we require an employee to stay home if they have symptoms of COVID-19? Yes.

## Q&A: *Disability-Related Questions and Exams*

5. Can we require a doctor's note certifying the employee is fit to return to work? Yes.
6. Can we ask employees if they have tested positive for antibodies? Risky.
7. Can we test or require an employee to get tested for COVID-19 before entering the workplace? Yes, but may not be practical.

# Q&A: *Reasonable Accommodations*

1. An employee with chronic lung disease has requested to work from home, must I allow them to telework?
  - First: do you have an obligation to provide a reasonable accommodation (not necessarily the requested accommodation)? Yes—if the person has a disability.
  - If yes: you must consider whether this is a reasonable accommodation. Engage in the interactive process.

## Q&A: *Reasonable Accommodations*

2. An employee with a serious underlying health condition that puts them at higher risk for complications of COVID-19 has requested leave for fear of contracting the virus, must I grant the request?
  - Engage in the interactive process.
  - Requests for leave can be a reasonable accommodation.
  - Indefinite leave?
  - Paid or unpaid?: CBA and ORC 3319.13
3. An employee whose child has a serious underlying health condition that puts them at higher risk for complications of COVID-19 has requested leave for fear of taking the virus home to their child, must I grant the request? No.

# Q&A: *Reasonable Accommodations*

## 4. Are there reasonable accommodations that could offer protection to an employee who, due to an underlying serious health condition, is at higher risk for serious complications from COVID-19?

- EEOC: some accommodations may meet an employee's needs on a temporary basis without causing undue hardship to the employer.
- Engage in the interactive process. Consider physical modifications (ex: barriers) and policy modifications (ex: modified schedules).
- Request for reduced contact with others due to a disability: consider changes to the work environment such as designating one-way hallways, using plexiglass, tables, or other barriers to ensure minimum distances between coworkers/student whenever feasible.
- EEOC urges flexibility: temporary job restructuring of marginal duties, temporary transfers to a different position, or modifying a work schedule or shift assignment.

## Q&A: *Reasonable Accommodations*

5. Is modified personal protective equipment a reasonable accommodation?
  - Yes. For example, alternative gloves if an employee has a latex allergy.

# Q&A: Confidentiality of Medical Information

1. Can we disclose the name of an employee to the local health department when we learn that the employee has COVID-19? Yes.
2. What should supervisors tell coworkers when another employee tests positive for COVID-19?
  - If the coworker has been exposed, you would tell them that they had been exposed, but not the other employee's name. Give your supervisors a script.



# Q&A: *Confidentiality of Medical Information*

3. With regard to records, where must we maintain COVID-19 medical information?
  - In a confidential medical file.
  - Address work-from-home concerns with your supervisors.

## Q&A: *Miscellaneous Issues*

1. During the pandemic, can I require employees to regularly wash their hands at work?
  - Yes. You may require infection control practices.
2. An employee tested positive for COVID-19, what should we do?
  - The infected employee should be sent home until released by a medical provider.
  - Notify the local health department for guidance.
  - Notify all employees who worked closely with that employee for an extended period of time. Do not reveal the employee's name.
  - Closing and cleaning protocols.

## Q&A: *Miscellaneous Issues*

3. Can we ask people about the health of their family members: Has your wife tested positive for COVID-19?
  - No. GINA says you can't ask people for genetic information, defined broadly as any information about family member's health.
  - Instead: Have you had contact with someone with COVID-19?

# Nine Things you Need to Know about the New Title IX Regulations

(In effect August 14, 2020)

# The Top 9



**TITLE IX  
BACKGROUND**



**NEW TITLE IX  
TERMINOLOGY**



**BUILDING YOUR  
TITLE IX TEAM**



**POLICY  
DEVELOPMENT**



**JURISDICTION  
REQUIREMENTS**



**THE  
INVESTIGATION**



**REPORT WRITING**

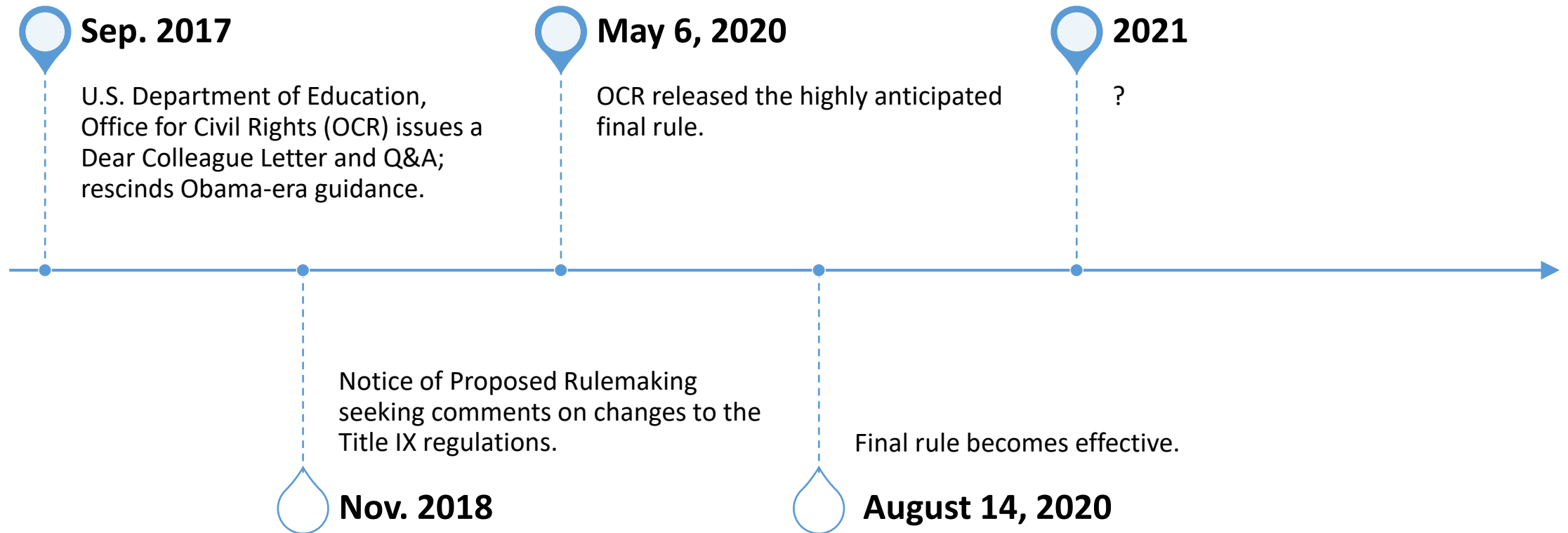


**CONFIDENTIALITY**



**TRAINING**

# Background on Title IX Regulations



# New Title IX Lingo (terms)

Recipients. School districts are now referred to as “recipients.”

Complainant. A person alleged to be the victim of conduct that could constitute sexual harassment.

Respondent. A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Supportive Measures. These are your “interim measures.”

Determination of Responsibility. This is your report/decision.

# New Title IX Lingo (definitions)

## Actual Knowledge

### Old Rule:

- A school has a responsibility to respond **promptly and effectively** if a school **knows or should have known** about sexual harassment.

### New Rule:

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent**.

### Definition of Actual Knowledge:

- Notice of sexual harassment or allegations of sexual harassment **to any employee**.



# New Title IX Lingo (definitions)

## Sexual Harassment

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 (i.e., *quid pro quo* sexual harassment);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity;

**OR**

3. "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.

# New Title IX Lingo (definitions)

## Deliberate Indifference

### Old Definition (OCR Guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

### New Definition (Title IX Regs)

- Failure to respond reasonably in light of known circumstances.

# Building Your Title IX Team

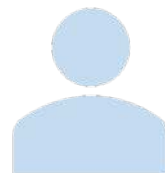
- **Title IX Coordinator(s)**

- Must be called the “Title IX Coordinator.”
- Must be designated and authorized to coordinate compliance efforts.
- Must promptly contact Complainant, discuss available supportive measures (with or without a formal complaint), and explain process for filing a formal complaint.
- Responsible for effective implementation of any remedies.
- New documentation requirements:
  - Measures taken to restore or preserve equal access to the program or activity;
  - The basis for the conclusion that the District’s response was not deliberately indifferent.



## Investigator

Person designated to investigate, gather evidence and compile an investigation report.



## Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



## Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

# Policy Development

- The new regulations require revisions to your Board Policies addressing Title IX.
- OSBA/NEOLA provide templates.
- Review templates carefully to ensure alignment with your district's operations and preferences:
  - Title IX Team
  - Live hearings are optional.

# Required Notices

- Each district is required to provide notice of the following to certain groups:
  - Nondiscrimination Policy Statement.
  - Notice of the Title IX Coordinator's name or title, office address, electronic mail address, and telephone number.
  - Notice of the District's grievance procedures and grievance process, including how to file a complaint of sex discrimination, how to report file a formal complaint of sexual harassment, and how the District will respond.

# Nondiscrimination Notice

- The District does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and its regulations not to discriminate in such a manner.
- The requirement not to discriminate in the education program or activity extends to admission and employment and inquiries about the application of Title IX and its regulations may be referred to the Title IX Coordinator or the Assistant Secretary for Civil Rights of the U.S. Department of Education.

# Nondiscrimination Notice

- Each district must provide notices to the following:
  - Applicants for admission and employment
  - Students
  - Parents/guardians of elementary and secondary school students
  - Employees
  - All unions or professional organizations with collective bargaining agreements or professional agreements with a school or institution



# Publication Requirements

- Districts must “prominently” display the name or title, office address, electronic mail address and telephone number of the employee(s) designated as the Title IX Coordinator(s) and its nondiscrimination notice on its website and in handbooks.
- Districts must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with the requirements for formal complaints.

# Jurisdiction

- To file a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient.
- “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.

# Jurisdiction

- Anyone may report sex discrimination (by mail, telephone, email, or any other means that results in the Title IX Coordinator receiving the report), regardless of whether the person is the alleged victim of the reported conduct.
- A Title IX Coordinator can sign a complaint to trigger an investigation over the complainant's objections.

# Jurisdiction

- What about off campus conduct?
  - Jurisdiction may still lie if there is control over the Respondent and the context, even if it occurs off campus.
- For off-campus misconduct outside the jurisdiction of the district, there may be in-program effects.
- Even if no jurisdiction under Title IX, a non-disciplinary remedial response would be best practice.
- May also want to look to other policies and code of conduct.

# Mandatory Dismissal of Formal Complaint

- Must dismiss a formal complaint if:
  - The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the law/policy, even if proved;
  - If the conduct alleged did not occur in the recipient's education program or activity;
  - If the conduct alleged did not occur against a person in the United States.
- Such dismissal does not preclude other action under the District's code of conduct or other policies.

# Discretionary Dismissal of Formal Complaint

- The District may dismiss a formal complaint or any allegations in the complaint if:
  - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations;
  - The Respondent is no longer enrolled or employed by the District;
  - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- Upon dismissal, must promptly send written notice of the dismissal and the reasons to the parties.

# The Investigation Process

## Written Notice Requirements for Formal Complaints

- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

# The Investigation Process

- **No bias approach.** Must maintain a presumption that the respondent is not responsible for the alleged conduct until a determination has been made.
- **Standard – choose only one.** Preponderance of the evidence or clear and convincing?
- **Informal Resolution.** Arbitration, mediation, or restorative justice is available when a formal complaint is filed. Written notice and written voluntary consent by both parties is required. This is never available where the complaint alleges harassment of a student by an employee. 34 CFR 106.45(b).



# The Investigation Process

- **Presenting witnesses and evidence.** Provide an equal opportunity for the parties to present witnesses and evidence.
- **Reviewing evidence.** Provide both parties and their advisors (if any) an equal opportunity to review all evidence related to the allegations in the formal complaint, even if you do not intend to rely on that evidence.
- **Question exchange.** Recipient must provide each party the opportunity after the completion of the investigative report to submit written, relevant questions to another party or witness.
- **Hearings.** Not required for K-12. Districts may determine they are appropriate on a case by case basis or for a particular grade level.

# Report Writing: The Investigator's Responsibility

- Step One:
  - Draft written investigation report.
  - Must fairly summarize the relevant evidence. Must be given prior to completing the final investigation report, hearing, and determination of responsibility.
  - Give at least 10 days for the parties to prepare a written response to the summary, which the investigator must consider in completing the final report.
- Step Two:
  - Draft final investigation report and provide to the Decisionmaker.

# Report Writing: The Decisionmaker's Responsibility

## The written “Determination of Responsibility:”

- Applies the standard;
- Identifies the allegations that potentially constitute sexual harassment;
- Describes the recipient's procedural steps taken from the receipt of the complaint to the determination;
- Includes findings of fact supporting the determination;
- Includes conclusions regarding application of board policy to the facts;
- Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the recipient's education program or activity will be provided to the complainant; and
- Includes procedures and permissible bases for appeals.

# Report Writing: The Appeal After

## Grounds for Appeal

Both parties have the right to appeal a determination of responsibility or a dismissal for the following reasons:

- (1) A procedural irregularity affected the outcome;
- (2) New evidence that was not reasonably available at the time of the determination and could affect the outcome;
- (3) Conflict of interest on the part of the Title IX Coordinator, Investigator, or Decisionmaker that affected the outcome; or
- (4) Other reasons as permitted by the recipient.

## Appeal Process

Once an appeal is made, the recipient must give both sides written notice and an opportunity to submit a written statement in support of or challenging the determination.

Appeals must result in a written decision that is provided to both parties simultaneously.

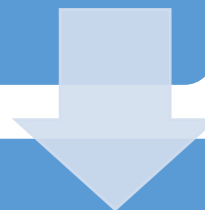
Note: Carefully consider the appropriate appeal person(s) to serve as appeal decisionmakers, given the unique training requirements and prohibitions on conflicts of interest.

# Confidentiality

Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence.



Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.



Will these responsibilities be frustrated in practice?

# Training Requirements

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on:
  - the definition of sexual harassment in the regulations,
  - the scope of the recipient's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

# Training Requirements

- Districts must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in the regulations.
- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.

# Training Requirements

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be made available on its website, if it has one.
- Training materials must be kept for 7 years.



**Thank you for your time and  
attention!**