

Employee Sexual Misconduct Cases

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Title IX In Focus
March 27, 2025

Disclaimers

We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address any specific situation
- You will receive a copy of the slides to post on your website!

And another one...

Specific to the Title IX In Focus Webinar Series

- The 2020 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss *some* of the required subject matter, none of these one-hour webinars will cover *all* of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

The Legal Landscape

- Title VII
- Title IX
- State employment laws
- Case law
 - Supreme Court, federal courts
 - State courts

Title VII

- Title VII of the Civil Rights Act of 1964
 - Prohibits employment discrimination based on race, color, religion, sex and national origin
 - Prohibits sexual harassment, including quid pro quo harassment and hostile environment harassment (severe or pervasive)
 - Enforced by the Equal Employment Opportunity Commission (EEOC)

- Title IX of the Education Amendments of 1972
 - Prohibits discrimination based on sex in education programs or activities that receive federal financial assistance
 - Prohibits conduct on the basis of sex that satisfies one or more of the following:
 - Quid Pro quo- 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;
 - 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
 - Clery Crimes: Sexual assault, dating violence, domestic violence, or stalking.
 - Enforced by the Department of Education's Office for Civil Rights

Title IX Regulations Apply to Employees

- The Preamble to the 2020 Title IX Regulations:
 - “The Department appreciates support for its final regulations, which apply to employees.” (30439)
 - “Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees.” (30439)
 - “The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations.” (30440)
 - No “inherent conflict” between Title VII and Title IX (30440)
 - Recipients that are subject to both Title VII and Title IX must comply with both (30440)

Title IX Jurisdiction (1 of 2)

- A recipient with actual knowledge of sexual harassment in an educational 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.” § 106.44(a)

- The Preamble to the 2020 Title IX Regulations:
 - “If a recipient has a code of conduct for employees that goes beyond what Title IX and these final regulations require (for instance, by prohibiting misconduct that does not meet the definition of ‘sexual harassment’ under § 106.30, or by prohibiting misconduct that occurred outside the United States), then a recipient may enforce its code of conduct even if the recipient must dismiss a formal complaint (or allegations therein) for Title IX purposes.” (30440)
 - “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires.” (30440)

Title IX, Title VII, both, neither?

- Employee A reports that Employee B sent an unwanted sexually explicit photograph to them while they were at work on campus
- A student reports receiving a sexual-explicit email from Employee B
- Employee C reports a sexual assault by Employee D while both were leading a study abroad trip
- Employee E reports meeting Employee F for the first time at an off-campus bar where Employee F engaged in fondling
- Employee G reports that their supervisor, Employee H, has offered them a promotion if they agree to go out on a date with them
- Employee I reports experiencing sex-based stalking by a student

Title VII Versus Title IX

- Conflicts between Title VII and Title IX noted by commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate indifference standard
 - Definition of Sexual Harassment
 - Report and Evidence review periods
 - Live hearing requirement (as opposed to notice and opportunity to respond)

Practical Considerations

- Is your Title IX Policy clear about its application to employees?
- Do you have a policy (or policies) for addressing Title VII sexual harassment that does not fall under Title IX?
- How might you deal with complaints alleging other potential conduct concerns that arise in a sexual misconduct matter (e.g. time theft, misuse of University resources, etc.)?
- What is your practice for responding to sexual misconduct reports from third parties about your employees?
- Supportive measures for employees- what resources exist and who else needs to be involved?

Leaves and Removals

- Administrative leave: The Title IX Regulations state, “Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.” (§ 106.44 (d))
- Emergency removal: “Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.” (§ 106.44 (c))

Other Considerations

- The Department of Education states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited
- You may have reporting obligations under certain grant programs (e.g. NSF, NIH, NASA)

Union Considerations

- The Preamble to the 2020 Title IX Regulations:
 - “in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.” (30298)
 - “There is no inherent conflict between these final regulations and any requirement that a union representative must be present for an investigatory interview that might lead to discipline.” (30456)
 - “If a State law requires a recipient to permit a union representative to be present during a disciplinary proceeding, the recipient may not be in violation of these final regulations by permitting a party to a Title IX grievance process from being accompanied by both an advisor of choice and a union representative. We reiterate, however, that a party is always entitled under these final regulations to select a union representative as the party’s advisor of choice to advise and assist the party during the grievance process.” (30456)

Sanctioning Considerations

- Who decides on employee discipline at your institution?
 - How are those individuals trained?
- If you are dealing with a Title IX matter, under 106.45(b)(7), the written determination regarding responsibility must include any disciplinary sanctions.
- How do you incorporate sanctioning into your Title IX process?

Upcoming Title IX In Focus Webinars

- April 24, 2025 – Sexual Misconduct Hearings
- May 29, 2025 – Title IX Litigation Update

Ideas for future webinars?

- Contact Jessica Galanos at jgalanos@brickergraydon.com

Thank You

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The logo icon for Bricker Graydon consists of a green square with a white arrow pointing up and to the right, and a blue square with a white arrow pointing down and to the right, overlapping the green square.