

# GIBSON DUNN

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**Navigating Employment  
Issues: Sexual Harassment,  
Sex Discrimination,  
and Other Potential Pitfalls  
in the Workplace**

# Overview

- **Part 1:** The Problems of Sexual Harassment and Other Workplace Misconduct.
- **Part 2:** Employment Law 101.
- **Part 3:** Strategies to Reduce Risk, Investigate Allegations, and Respond Effectively.

# Goals

- Introduce you to the legal and professional risks of ignoring sexual harassment and other employment pitfalls.
- Provide practical guidance for responding to behavioral complaints, conducting an investigation, and taking appropriate action.
- Teach you how to foster a culture of respect in the workplace—with an understanding that today's workplace extends well outside the office.

# Goals

- **Bottom line: If you aren't thinking about how to comply with employment laws, you are almost certainly risking violating them.**



# Part I

## **The Problems of Sexual Harassment and Other Workplace Misconduct.**

## In Their Own Words...

- Former CEO of Thinx resigned after harassment controversy:
  - “When I started, like any entrepreneur, I was fighting for the life of the company, the clock was against us and I needed to make sure that we didn’t close our doors after 1 year like 60%+ of businesses do.”
  - “Then, things grew and they grew fast.” ...

## In Their Own Words...

- “One problem area throughout our startup’s story and no different to many in our position: human resources. **I didn’t take time to think through it.** We grew so quickly and I didn’t hire an HR person (it was hard to rationalize hiring an HR person at the time with only 15 employees and then all of a sudden we were 30 people). I didn’t call references because I needed butts in seats fast. I didn’t put HR practices in place because I was on the road speaking, doing press, brand partnerships, editing all of the creative and shouting from the rooftops about THINX so we can keep going.”

# Legal Consequences

- Tens of millions of dollars of damages and penalties owed – even for a single plaintiff and *even if the company didn't know about the harassment*.
- 2011: Jury awards \$95 million to female victim of sexual harassment.
- 2012: Jury awards almost \$168 million to another victim of sexual harassment.
- 2014: Ellen Pao (unsuccessfully) sues Kleiner Perkins for \$16 million for gender discrimination.

# Professional Consequences

- In addition to the legal consequences, failing to combat even subtle harassment, discrimination, and disrespect may:
  - Discourage others from working with you, working for you, or acquiring your company.
  - Permanently ruin a good reputation and stigmatize your company.
  - Reduce employee well-being, productivity, and morale.
  - Lead to complaints that take time to investigate—time better spent on your company’s business objectives.

# Hypothetical

- Joe has read a lot of the recent press about sexual harassment allegations in the workplace. Because he doesn't want to send the wrong message to his female coworkers, he only gets together for drinks with his male coworkers because they can be comfortable as "just the guys." He's naturally formed great mentorship relationships with some junior male coworkers because he feels comfortable that positive or constructive feedback will not be misinterpreted.
- *Is this ok?*

# Hypothetical

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- *Is this ok?*
  - **No. Engaging in behavior that creates the impression of sex- or gender-based favoritism is unacceptable and potentially unlawful.**

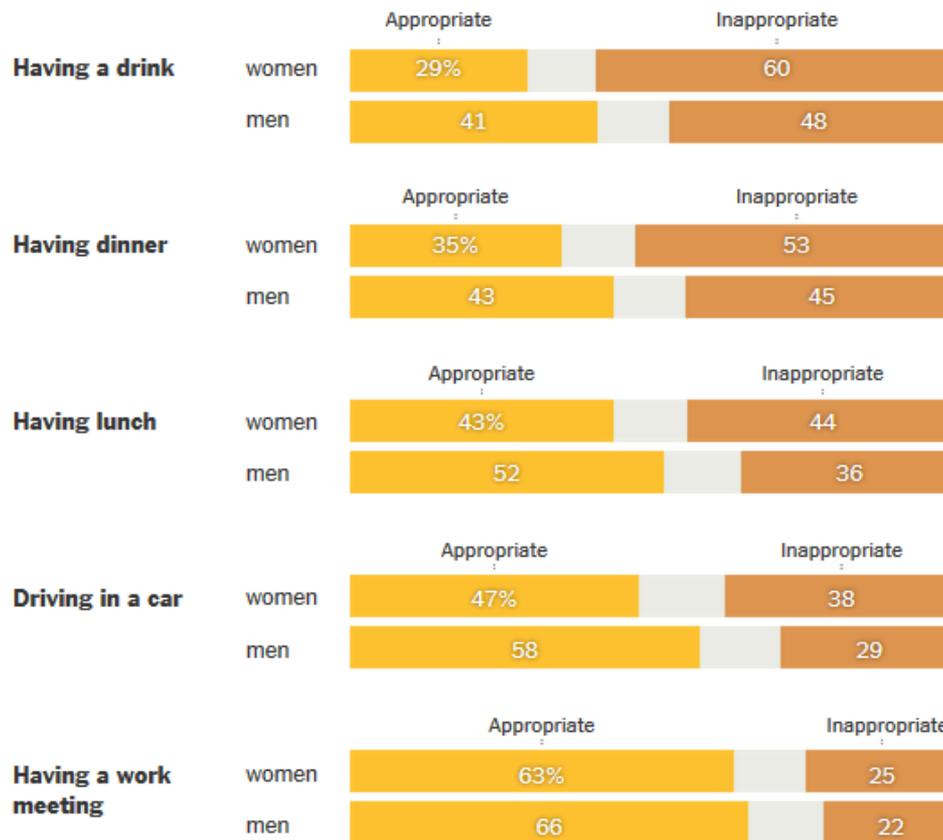
# Hypothetical

- However, sex discrimination based on “preventative” self-segregation is more common than you think.

*“In 2002, [Vice President] Mike Pence told the Hill that he never eats alone with a woman other than his wife and that he won’t attend events featuring alcohol without her by his side, either.”*

- ***The Washington Post, March 28, 2017.***

# Survey: What activities are appropriate with a man or woman who is not your spouse?





## Part II

# **Employment Law 101.**

# What Is “Discrimination”?

- Broadly, discrimination is any **unfair treatment taken on account of a protected characteristic.**
- Another way to think about it is an adverse employment action based on a protected characteristic or prohibited basis.
- It can also include retaliation for complaints regarding possible discrimination.
- **Sexual harassment is a form of discrimination.**
- **So is sex or gender “self-segregation.”**

# Protected Classes

- Race.
- Color.
- Ancestry.
- Religious creed (including religious dress and grooming practices).
- Sex (including pregnancy, childbirth, breastfeeding, and sex-related medical conditions).
- Gender, gender identity, and expression.
- National origin (including language use restrictions).
- Age (40 and over).
- Military and veteran status.
- Marital status.
- Sexual orientation.
- Family and Medical Care Leave.
- Mental and physical disability (including HIV and AIDS).
- Medical condition (including cancer and genetic characteristics).
- Genetic testing.
- Any other characteristic protected by local, state, or federal law.

# Sexual or Other Harassment

- There are two types of harassment:
  - **Quid pro quo harassment.**
  - **Hostile work environment harassment.**

# Quid Pro Quo Harassment

- **Quid pro quo** harassment: When a supervisor ties a job benefit (assignment, raise, promotion, lack of demotion, etc.) to any kind of sexual favor(s).
- Some examples of **quid pro quo** harassment include:
  - Harry downgrades Sasha's performance evaluation because she won't become sexually involved with him.
  - Susan refuses to give Amir the information he needs to get the job done because he refused to "play along" with sexual jokes and flirtation.
  - Dave gives Amanda "work perks" when they are dating, but then stops doing so when she breaks up with him.

# Hostile Work Environment Harassment

- **Hostile work environment** harassment: When a victim is subject to *unwelcome* and *offensive* behavior or comments, and the harassment is *severe or pervasive* enough that a reasonable person would find that they unreasonably interfere with their work environment.
- Some examples of conduct that can create a **hostile work environment**:
  - Racial or ethnic jokes or slurs.
  - Unwanted sexual advances, invitations, or touching.
  - Obscene language, jokes, or gestures.
  - Making fun of someone's disability, age, or religious belief.

# Forms of Harassment

- Both **quid pro quo** and **hostile work environment** harassment can be:
  - Spoken.
  - Visual/Non-Verbal.
  - Physical.

# A Note on Alcohol & Other Drugs

- Alcohol in the workplace should be approached with caution:
  - Be reasonable and appropriate with alcohol usage.
    - E.g., after-hours team happy hour (probably ok) vs. alcohol available in employee kitchen 9 to 5 (consider whether this advances your company's objectives).
    - Consider adding team-building activities that do not involve alcohol.
  - *Alcohol is never an excuse for sexual harassment or other misconduct.*
  - Marijuana: state laws vary—and are rapidly evolving.

# Retaliation

- Retaliation is taking an adverse employment action against someone because they made a complaint regarding harassment or discrimination.
- An **adverse employment action** is one a reasonable employee would find materially adverse:
  - Obvious: termination, demotion, unfavorable reference, denial of promotion or advancement.
  - Not so obvious: lateral transfer, more (or fewer) job responsibilities.
- **Retaliation is unlawful.**

# Employment Law 101

- You must follow local ordinances, state laws, and federal laws.
- California has among the toughest employment laws in the country—and San Francisco, Los Angeles, and other municipalities often enact tougher laws on top of that.
- California also has special laws guaranteeing equal pay for women. It also has procedures that make it easy for penalties per pay period to rack up quickly.



# Have You Considered...?

- **Employment law presents many deceptively “simple” questions:**
  - Is your workforce properly **classified**?
  - Do you have employees who are **not exempt from overtime**?
  - Are you making **rest and meal breaks** available? Are those breaks compliant?
  - Do your **wage statements** have all legally-required information?
  - Do you have a **record-keeping system** sufficient to keep at least three years of employee records?
  - Are you **reimbursing employees** for expenses like cell phone service?
  - Do you need to provide **anti-harassment training**?
  - Are your **family and medical leave** policies legally compliant?

# Antitrust Risk in Employment

- It may be unlawful to:
  - Agree with another company about employee salaries, benefits, or *any* other aspect of compensation, like free gym memberships or free meals.
  - Agree not to “poach” a company’s employees by agreeing not to recruit or hire another company’s employees.
  - Express to competitors that they should not compete aggressively for employees.
  - Share sensitive or private employment information with competitors.

# California Fair Pay Act

- Requires equal pay for **substantially similar work**.
- It is the **employer's burden** to prove that different wages are based on:
  - A seniority system;
  - A merit system;
  - A system that measures earnings by quantity or quality of production; or
  - A bona fide factor other than sex, such as education, training, or experience – but only when it is a business necessity.
- And, an employer is not allowed to prohibit employees from sharing how much they make with other employees.

# Employment Law 101

- *You got all that, right?*
  - And on top of the myriad of complex local, state, and federal laws—the law is constantly changing.
  - Employers are presumed to know the law—most penalties cannot be avoided even if the employer acted in good faith.



## Part III

# **Preventing, Investigating, and Responding to Sexual Harassment and Other Workplace Misconduct.**

## **General Strategies to Reduce Legal Risk.**

# Preventing Sexual Harassment & Other Misconduct

- Create “zero tolerance” policies against harassment, discrimination, and retaliation. Review annually.
- Foster a workplace culture that values mutual respect and discourages “borderline” conduct (e.g., disrespectful or inappropriate conduct that is not necessarily illegal).
- Communicate your company’s policies, values, and reporting mechanisms to employees early and often with training by HR or outside counsel.
  - *Lead by example!*

# A Culture of Respect Begins in Recruiting

- **Do:**
  - Discuss company's culture of respect in recruiting materials and interviews: set high expectations up front.
  - Contact references and do appropriate diligence about potential hire's interpersonal interactions.
- **But do not:**
  - Ask about arrests, expunged convictions, or marijuana convictions.
  - Include physical, psychological, or other irrelevant requirements in job qualifications—unless job-related and consistent with business necessity.

# Other Compliance Best Practices

- Review policies, employment agreements, and wage statements to ensure legal compliance, with assistance from counsel as necessary.
- Be thoughtful about documentation and stay organized.
- Train employees on legal compliance and appropriate work behavior.
- If your company is too small to hire a single HR manager, do not split HR responsibilities between multiple people. Consider a part-time HR consultant.

# Investigating Allegations of Misconduct

- Train employees to report any instances of inappropriate conduct to HR or management and not to assume the company is aware of what is happening.
- Establish procedures for responding to allegations of misconduct:
  - Immediate investigation of allegations.
  - Confidential to extent possible to ensure a full and fair investigation.
  - Independent investigation by outside counsel is strongly recommended, particularly in sensitive situations, e.g., allegations against a fellow partner.

# Responding to Allegations of Misconduct

- Discipline the offender as necessary, up to and including termination.
- Document the investigation's findings and corrective action taken, if any.
- Re-enforce employment policies and company values of respect with employee trainings.
- Develop appropriate media strategy as necessary.
- Seek advice of legal counsel.

# Questions?

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