

GOVERNANCE MATTERS

A Practical Guide

for University Trustees

*ILLINOIS PUBLIC UNIVERSITY TRUSTEES
ANNUAL TRAINING CONFERENCE
ILLINOIS BOARD OF HIGHER EDUCATION
SEPTEMBER, 2018*

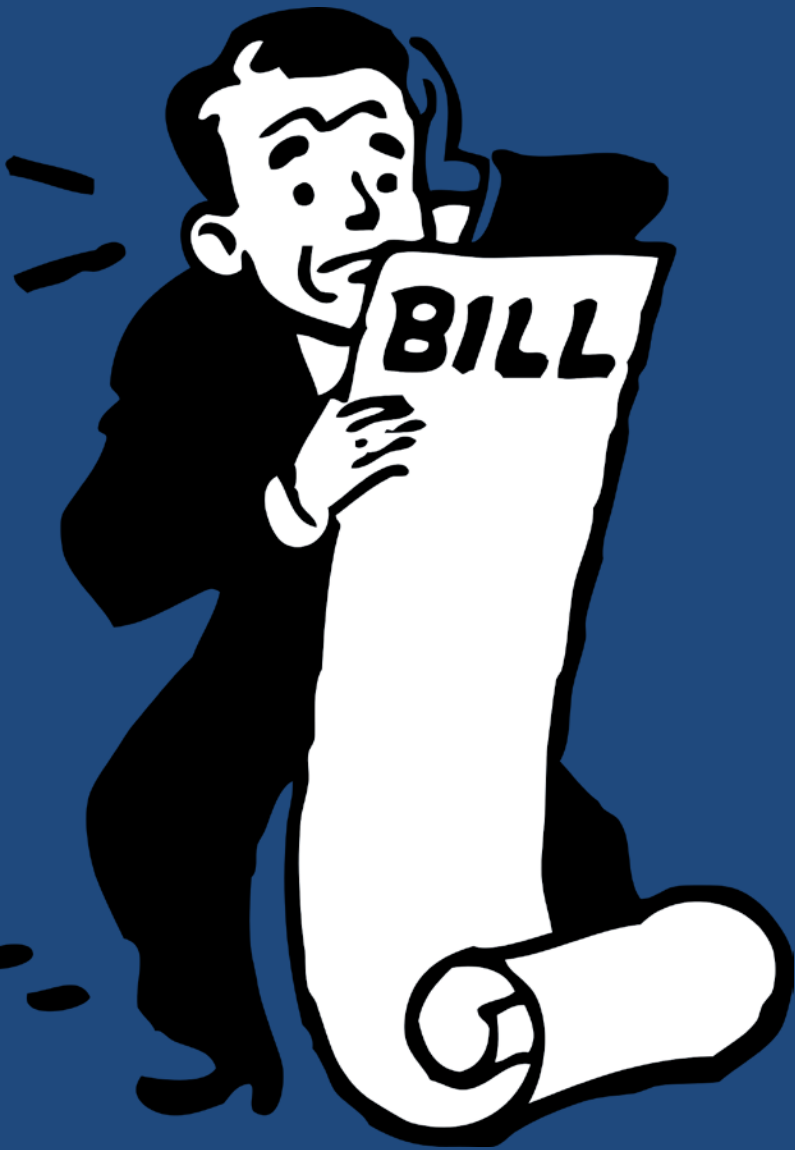
“Governance of American colleges and universities is at a crossroads. The governing bodies of these institutions face critical challenges to methods of operation and oversight that have been in common use for decades, but which are underperforming in satisfying current stakeholders and protecting future generations. At the same time, they are under greater scrutiny than ever before, with their members increasingly held accountable for the success or failure of their institutions.”

--Association of Governing Boards
of Universities and Colleges

University trustees are required to govern in a complex, increasingly uncertain and risky environment.

Stakes are high....

Rewards are few



- ❑ In 2016, the Illinois General Assembly enacted amendments to the Board of Higher Education Act recognizing the importance of good governance by University Boards of Trustees.
- ❑ Effective as of January 1, 2017, each voting member of a governing board of a public university must complete a minimum of 4 hours of professional development leadership training.
- ❑ Topics are to include training on various matters including ethics and fiduciary responsibilities.

University Trustees are fiduciaries.

A fiduciary relationship is one of trust or confidence between parties. A fiduciary is someone who has special responsibilities in connection with the administration, investment, monitoring, and distribution of property—in this case, the charitable or public assets of the institution. These assets include not just the buildings and grounds and endowment, but also intangibles, such as the reputation of the institution and its role in the community.

Importantly, a University Board member has duties to the institution under the law that a faculty member, a student, or an administrator does not.

- ▣ Fiduciary duties of care, loyalty and obedience.
 - Require Board Members to make careful, good-faith decisions in the best interest of the institution consistent with its public or charitable mission, independent of undue influence from any party or from financial interests.
 - These duties may be described in and imposed by a University's bylaws, governing board policies, standards of conduct, code of ethics, and State law.

Good governance is critically important for University Trustees to fulfill their fiduciary duties and achieve optimal performance while maintaining the confidence of their constituencies.

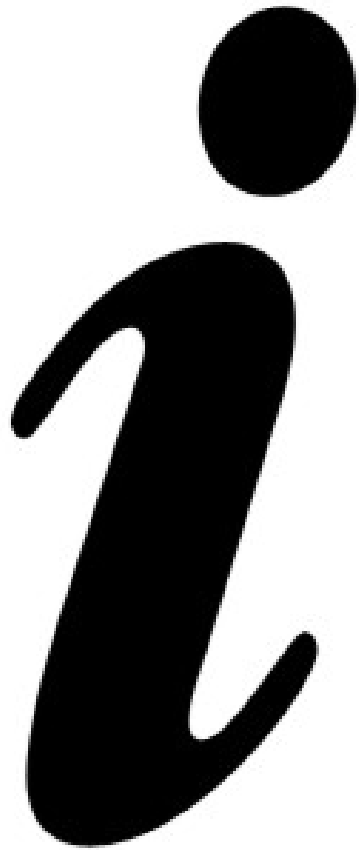
Goal of today's presentation is to provide an overview of some of the Illinois laws that you as Trustees are required to follow and some of the pitfalls that have occurred as a result of Trustees failing to follow good governance principles.

The 4 “I”s of Good Governance



Trustees must:

- Be Informed
- Seek Improvement
- Exercise Independence
- Maintain Integrity

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Be Informed

Boards of Trustees need to be informed and knowledgeable of state laws that impact a Trustee's decision-making process.

- 1) The Freedom of Information Act
- 2) The Open Meetings Act
- 3) The State Employees' & Officers' Ethics Act
- 4) The Governmental Ethics Act
- 5) The Gubernatorial Boards & Commissions Act
- 6) Individual University Acts & University Policies



SIPRESS

*"My desire to be well-informed is currently
at odds with my desire to remain sane."*

FOIA Landscape

- ❑ Illinois was the last state to enact a law permitting access to public records (*See* Public Act 83-1013, effective July 1, 1984).
- ❑ A 1999 audit by the Associated Press found that more than two-thirds of state government organizations did not comply with FOIA.
- ❑ A 2006 investigation by the BGA yielded a 60% noncompliance rate with almost 40% of the Illinois governments tested reporting that they never even responded to the FOIA request.
- ❑ During the Rahm Emanuel administration alone, the City of Chicago faced over 60 lawsuits involving FOIA.

What is a Public Record?

- ▣ Section 2(c) of FOIA (5 ILCS 140/2(c)) provides that “public records” are: “[a]ll records *** and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.”
- ▣ The presumption is that all public documents are open to inspection as noted in Section 1.2 of FOIA (5 ILCS 140/1.2): “[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.”

The Illinois AG has held that a public body responding to a FOIA request must conduct an adequate search of personal e-mail accounts and personal devices when email communications and text messages concern the business of the public agency.



- ❑ Compensation & Bonuses: In 2016, the Illinois AG held that the Housing Authority of the City of Freeport must disclose records relating to employee compensation and bonuses because such records relate to the use of public funds.
- ❑ Facebook/Skype: In 2016, the Illinois AG found that a public body must disclose Facebook and Skype account names because such names are akin to or derived from the individual's legal name, which is subject to disclosure.
- ❑ Student Records: In 2017, a Kentucky Court held that the Family Educational Rights and Privacy Act ("FERPA") protected University of Kentucky student information in a sexual assault case as educational records exempt from disclosure under FOIA laws. The Court also held that the records could not be disclosed in redacted form because redaction would not offer adequate protection from identifying the students.

Southern Illinois University

- ❑ In July 2018, Southern Illinois University's President was removed from office after a FOIA requester obtained e-mails revealing his support of an effort to shift funding away from the Carbondale campus to the Edwardsville campus.
- ❑ One of the President's e-mails stated he was using certain funding distribution figures "simply to shut up the bitches from Carbondale" who opposed the plan.
- ❑ The case also involved unsuccessful attempt by two members of executive committee to call special meeting for purpose of removing the President from office. After the Board chairman objected based on grounds that by-laws did not permit executive committee such authority, the trustees withdrew the request and a special meeting of the full board was scheduled.

College of DuPage

- ▣ In 2015, the Chicago Tribune initiated an investigation against the college which raised questions about top administrators' expense accounts and other spending issues.
- ▣ The Tribune ultimately filed a lawsuit contending that the College and its foundation violated FOIA by refusing to produce records held by the foundation including documents relating to a foundation account that paid expenses for the college's prior President.
- ▣ After the lawsuit was filed, the college turned over some records showing how the President used foundation money (nearly \$102,000) on high-end restaurants, trustees' bar bills, a rifle for a departing foundation officer, among other expenses. The College fired the President and rescinded his \$763,000 severance package amid growing public scrutiny.

Open Meetings Act

- ▣ The Open Meetings Act is designed to prohibit secret deliberations and action on matters which, due to their potential impact on the public, properly should be discussed in a public forum. *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980).

- ▣ What is a “meeting” under the Open Meetings Act?
 - “Meeting” is defined as “any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02.



*"Let's never forget that the public's desire for transparency
has to be balanced by our need for concealment."*

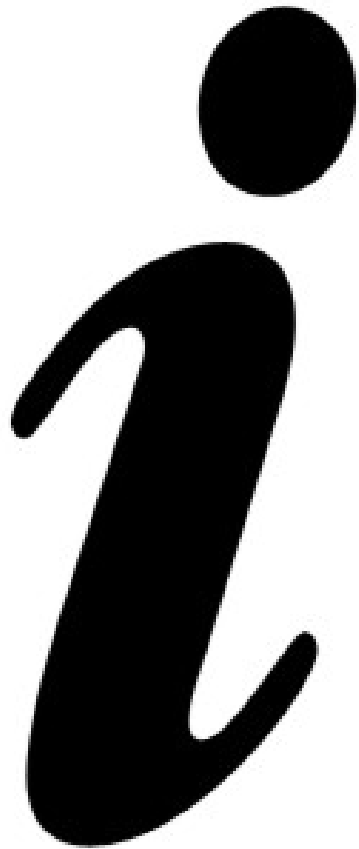
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COLLECTION

Community College Example

- ▣ At a 2015 special meeting, the Board discussed the financial condition of the College in executive session under 2(c)(1) and 2(c)(5) of the OMA, allowing public agencies to go into executive session to discuss personnel matters and the lease or purchase of real property.
- ▣ The topics actually discussed in executive session included:
 - Financial Uncertainties of the College;
 - Financial Stewardship;
 - Financial 5 Year Forecast;
 - Property Tax Levies; and
 - Impacts of Limited Financial Resources.
- ▣ AG concluded that Board's brief discussion on general matters related to employees in general (such as staffing levels, 2(c)(1), and the importance of having a financial context for upcoming negotiations with employees, 2(c)(1)) and the College's efforts to sell or lease property owned by the College (2(c)(5)) did not authorize the Board to discuss the other matters which were discussed in executive session.

Northern Illinois University

- ❑ In November, 2017, a state court found that the Board of Trustees of Northern Illinois University had violated the Illinois Open Meeting Act by not properly disclosing the full agenda in regards to a severance package for the outgoing President.
- ❑ The President had resigned in June 2017 after a state watchdog agency concluded he mismanaged the university. The Board awarded him a \$617,500 severance package, the specific terms of which had been agreed upon by the Board during a closed meeting. The Board then voted on the agreement in open session without specifying the terms.
- ❑ Board meeting agenda had stated only that session was for “presidential employment, review, and approval.” The court found this language to be misleading to the public based on the content of the discussions in the closed session.

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Seek
Improvement

Governing Boards have a fiduciary duty to address issues of overall campus culture, including sexual misconduct.

The number of higher education institutions facing criticism over the manner in which they have responded to sexual misconduct allegations has steadily increased and universities are defending against lawsuits, federal investigations, and negative publicity arising from their response to sexual harassment on campus.

Good governance requires Trustees to seek areas for improvement in how University administrators and faculty address sexual harassment in the workplace and on campus.

Governing Boards have a duty to become and remain informed about sexual misconduct affecting their campuses and to satisfy themselves that administrators are addressing the issue in a way that protects their institutions against potential adverse financial and reputational consequences.

Generally, governing Boards should monitor sexual misconduct issues consistent with their oversight of all institutional risk. Fulfilling this obligation demands striking a delicate balance.

Effective governance requires avoiding micromanagement while being sufficiently informed to assess institutional effectiveness.



Uber board member resigns after making a joke about women at a company meeting on sexism

SPORTS
How the #MeToo Movement Is About to Change Pro Sports

The New York Times

Los Angeles Times

ESPN Sued Over Discrimination And Sexual Harassment Allegations

Bill Cosby's retrial may be the first real test of the power of #MeToo



NPR Board Faces Tough Questions Over Sexual Harassment Handling

February 22, 2018 - 5:40 PM ET

Weinstein Company hit with lawsuit following sexual assault allegations

Actor Dominique Huett files \$5m civil suit against film company for 'abetting' Harvey Weinstein, alleging board members knew about and misconduct

NCAA Will Require Athletes And Coaches To Complete Sexual Violence Education

Aziz Ansari Steps Out with Chris Rock for Rare Appearance After Sexual Harassment Allegation

02/28/2018, 04:39pm

City Council closes gaping hole in sexual harassment ordinance

* NEWS

04/11/2018, 11:08am

For fifth time in six months, aldermen strengthen sexual harassment ordinance

Open letter alleges rampant sexual harassment in Illinois politics

Sexual Harassment Becomes Hot Topic In Springfield

CRAIN'S
CHICAGO BUSINESS.

CBS Chicago

02/07/2018, 06:48pm

10 women accuse Northwestern journalism professor of sexual harassment, bullying

* NEWS

02/20/2018, 03:05pm

Three women tell harrowing stories of sexual harassment at Ford Chicago plants

Chicago Tribune

After sex harassment allegation, Silverstein loses Illinois Senate seat

Megachurch pastor Bill Hybels resigns from Willow Creek after women allege misconduct

CHICAGO SUN-TIMES

CHICAGO TONIGHT

Illinois Takes On Sexual Harassment

Hundreds of USC professors are demanding the university's president resign amid a mounting sexual-misconduct scandal involving a school gynecologist

Timeline: Baylor sexual assault controversy



Michigan State University Is Botching Its Reputation-Rehab

The New York Times

CHICAGO'S VERY OWN
WGNI9

Ten women sign letter accusing Northwestern journalism professor Alec Klein of sexual harassment and assault



Michigan State Agrees to Pay Sexual Assault Victims \$500 Million



Former Penn State President Sentenced to Jail Over Sandusky Scandal

Ohio State Trustee Resigns, Calls Meyer's Penalty Too Light

Trustees Take Heat

Michigan State board members face calls for their resignation in the wake of the Larry Nassar scandal, but it's hard to force out boards. Some say that's for good reason.

Michigan State University President Resigns In Wake Of Sexual Assault Scandal

Ohio State University says it's creating new office to respond to sexual violence and harassment

IDENTIFYING SEXUAL HARASSMENT

The State of Illinois, the City of Chicago and the County of Cook all rely on the definition of sexual harassment from the Illinois Human Rights Act in formulating policies and laws aimed to prevent sexual harassment.

The Illinois Human Rights Act protects Illinois employees, tenants, students and others from sexual harassment.

Charges of sexual harassment can be filed with the Illinois Department of Human Rights against the individual harasser as well as the employer or educational institution. Both parties can be found liable.

- ▣ Sexual harassment is any unwelcome sexual advances, requests for sexual favors or any conduct of a sexual nature when:
 - Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;
 - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

In education, sexual harassment is any unwelcome sexual advances, or requests for sexual favors made to a student by an executive, administrative staff or faculty member, or any conduct of a sexual nature that substantially interferes with the student's educational performance or creates an intimidating, hostile, or offensive educational environment.

Sexual harassment in educational institutions can be perpetrated by any representative of the institution, such as an executive, faculty or administrative staff member or teaching assistant.

The courts have determined that sexual harassment is a form of discrimination under Title VII of the U.S. Civil Rights Act of 1964, as amended in 1991, and Title IX of the Education Amendments of 1972.

The U.S. Department of Education's regulations implementing Title IX have required that universities and colleges: (1) publish a statement of non-discrimination; (2) appoint an employee responsible for Title IX compliance, and (3) adopt and publish prompt and equitable grievance procedures for those making complaints of sexual harassment and discrimination.

Sexual harassment generally involves employment and/or work performance whereas sexual assault is a criminal assault of a sexual nature against another person.

To constitute discrimination because of sex, actionable sexual harassment requires showing that the conduct is directed at victim because of his or her gender.

Distinction between “equal opportunity jerk” and “harasser”.

A supervisor who bullies ALL of his or her employees using gender-neutral language or tactics is not in violation of the Civil Rights Act because he or she treats men and women equally poorly.

- Example: A recent Federal Court decision held that a female employee’s supervisor “had a reputation of being rude to everyone, regardless of the individual’s gender. Although the supervisor’s comments toward and interactions with the employee were rude and inappropriate, they were not different than those directed at male employees and did not in themselves reflect bias based on gender in violation of the Civil Rights Act.”

- ▣ Categories of Sexual Harassment include:
 - Quid Pro Quo (sexual demands)
 - Hostile Work Environment

- ▣ Types of Sexual Harassment include:
 - Verbal/Non-Verbal Harassment
 - Visual Harassment
 - Physical Harassment
 - Textual/Electronic

- ▣ **Verbal:** Sexual innuendos, suggestive comments, insults, humor, and jokes about sex, anatomy or gender-specific traits, sexual propositions, threats, repeated requests for dates, or statements of a sexual nature about other employees, even outside of their presence.

- ▣ **Non-verbal:** Suggestive or insulting sounds (whistling), leering, obscene gestures, sexually suggestive bodily gestures, “catcalls”, “smacking” or “kissing” noises.

- ▣ **Visual:** Posters, signs, pin-ups or slogans of a sexual nature, viewing pornographic materials or websites.

- ▣ **Physical:** Touching, unwelcome hugging or kissing, pinching, brushing the body, and coerced sexual act, or actual assault.

Textual/Electronic:

- “Sexting” (electronically sending messages with sexual content including pictures and video);
- Cyber stalking;
- And threats via all forms of electronic communication (e-mail, text messages, on-line postings, blogs, instant messages and social network websites).



Sexual advances and requests for sexual favors are not the only types of conduct that can be sexual harassment. Other conduct of a sexual nature can be part of quid pro quo sexual harassment or contribute to a hostile work environment, including:

- ▣ Actual or attempted rape or sexual assault
- ▣ Pressure for sexual favors
- ▣ Deliberate touching, leaning over, or cornering
- ▣ Sexual looks or gestures
- ▣ Letters, telephone calls, personal e-mails, texts, or other materials of a sexual nature
- ▣ Pressure for dates
- ▣ Sexual teasing, jokes, remarks, or questions
- ▣ Referring to an adult as a “girl”, “hunk”, “doll”, “babe”, “honey” or other diminutive term
- ▣ Whistling at someone
- ▣ Sexual comments, sexual innuendos, or sexual stories
- ▣ Turning work discussions to sexual topics
- ▣ Asking about sexual fantasies, preferences or history
- ▣ Making sexual gestures with hands or through body movements
- ▣ Sexual comments about a person’s clothing, anatomy, or looks
- ▣ Kissing sounds, howling and smacking lips
- ▣ Telling lies or spreading rumors about a person’s personal sex life
- ▣ Neck and/or shoulder massage
- ▣ Touching an employee’s clothing, hair or body
- ▣ Hanging around a person uninvited
- ▣ Hugging or kissing
- ▣ Patting, stroking, or pinching
- ▣ Touching or rubbing oneself sexually in the presence of another person
- ▣ Standing close to or brushing up against a person
- ▣ Looking a person up and down
- ▣ Sexually suggestive posters, cartoons, or magazines displayed in the workplace or shown to someone
- ▣ Playing sexually suggestive or graphic videos or music

Considerations for Whether Conduct is Sexual Harassment

- ❑ Gender is Irrelevant.
- ❑ Sexual Harassment & Third Parties. Victim does not need to be the person the behavior is directed towards.
- ❑ Behavior is Unwelcome. Challenged behavior may be unwelcome in sense that the victim did not solicit or invite it and considered the conduct offensive.
- ❑ Intent vs. Impact. Intent is NOT relevant.
- ❑ Working Environment. Behavior may extend to other office locations, off-site or electronic messages (emails/texts).
- ❑ Sexual Harassment is Not limited to Co-Workers and Supervisors. Patrons and vendors may violate sexual harassment laws and they may be victims of sexual harassment.

ADDRESSING & PREVENTING SEXUAL HARASSMENT

The Illinois Department of Human Rights (“IDHR”)

- ❑ The IDHR is a State agency that administers the Illinois Human Rights Act.
- ❑ One of IDHR’s roles is to investigate charges of discrimination, including allegations of sexual harassment in employment.
- ❑ If the IDHR finds that there is “substantial evidence” of a violation of the Illinois Human Rights Act, a complainant may file a lawsuit in circuit court or the Illinois Human Rights Commission.
- ❑ Possible remedies may include back pay, lost benefits, clearing of a personnel file, emotional damages, hiring, promotion, reinstatement, front pay where reinstatement is not possible, and attorney’s fees and costs.
- ❑ It is a public process and may take several years.

The Equal Employment Opportunity Commission (“EEOC”)

- ❑ To bring a legal complaint of sexual harassment under the Civil Rights Act, an employee must file a charge of discrimination with the EEOC and obtain a “right to sue” letter from the agency.
- ❑ The EEOC will interview witnesses and collect evidence relating to the complaint.
- ❑ If the EEOC determines that discrimination occurred, the EEOC will invite the employee and employer to attempt to informally settle the case.
- ❑ In the event the parties cannot settle the case, the EEOC will issue a “right to sue” letter allowing the employee to bring a lawsuit.
- ❑ You must file your lawsuit within 90 days after receiving your “right to sue” letter.
- ❑ It is a public process and may take several years.

TIMING MATTERS!

A charge must be filed with IDHR and/or the EEOC within 180 days of the incident.

Prohibitions Against Retaliation

- ❑ The Illinois Human Rights Act states that it is a Civil Rights violation for a person to retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful sexual harassment.
- ❑ The Whistleblower Act states that an employer may not retaliate against an employee for disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of sexual harassment State or federal laws, rules or regulations.
- ❑ Remedies available if retaliation occurs may include:
 - Reinstatement of employment;
 - Two times back-pay;
 - Interest on back-pay;
 - Reinstatement of fringe benefits and seniority rights; and
 - Payment of reasonable costs and attorney's fees.

- ▣ In Illinois, there are two categories of employer liability involving sexual harassment:
 - Vicarious liability
 - Strict liability

- Vicarious liability --an employer may be liable for the sexual harassment of an employee by a co-worker.
 - It is not automatic liability.
 - Under the Illinois Human Rights Act, an employer is only vicariously liable for the sexual harassment of an employee by a co-worker if it knew or should have known of the harassment and failed to take immediate and appropriate action to stop the harassment.

- Strict liability –an employer is liable for the sexual harassment of an employee by a supervisor.
 - Automatic liability.
 - An employer is strictly liable for any supervisor's actionable harassment, regardless of whether the employer took immediate and appropriate action.

- ▣ In 2009, the Illinois Supreme Court expanded the range of cases where an employer can be held strictly liable for the conduct of a supervisory employee.
 - *Sangamon Cty Sherriff's Dept v. The Illinois Human Rights Comm'n, Nos. 105517* (Ill. Apr. 16, 2009): The IL Supreme Court found that an employer is responsible for sexual harassment by a supervisor, regardless of the supervisor's actual authority over the victim.

- ▣ This was a significant departure from federal caselaw interpreting the Civil Rights Act. Under the Civil Rights Act, an individual is not a “supervisor” for purposes of imposing strict liability unless he or she has the authority to affect the victim’s employment directly.

Under landmark U.S. Supreme Court decisions, the Supreme Court held that employers have an affirmative defense for liability involving the harassing conduct between co-workers when:

- (1) no tangible job action (such as demotion or a termination) occurred;
- (2) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and
- (3) the employee unreasonably failed to take advantage of the preventative/corrective opportunities provided by the employer or to otherwise avoid harm.

- ❑ Governing Boards may also have liability in the event of sexual harassment involving students on campus.
- ❑ In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court held that there is a private right of action in Title IX cases, giving individual students the ability to enforce Title IX's prohibition on intentional sexual harassment and discrimination.
- ❑ In *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), the Supreme Court made it clear that the private right of action included claims against a school district for deliberately ignoring a teacher's sexual harassment of a student, and in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999), the sexual harassment of a student by another student.
- ❑ As a result, Universities can be sued for damages if they are aware of sexual harassment involving students – either by a faculty member, staff member or another student, and do not properly address the harassment claim.

Universities will be looked on more favorably in the event of a charge of sexual harassment if the educational entity: (i) has a strong, well-published sexual harassment policy for both employees and students that is consistently and promptly applied and enforced; and (ii) active programs to assure employees and students understand the policy.

As with any significant institutional risk, Boards should request regular, formal reports by the responsible administrator outlining the nature of the risk, the likelihood of its occurrence, and the existence and effectiveness of internal controls, including any plans for risk mitigation. These reports should take place against the backdrop of the institution's overall obligations, as opposed to specific student situations.

Southern Illinois University

- ▣ In 2012, a SIU student worker in the SIU student employment program sued SIU after three encounters with a former SIU professor and substantial donor, in which the former professor touched the student inappropriately and complimented him on what he believed to be his feminine features.
- ▣ SIU's response to the harassment was held by the court to be reasonable because of the following:
 - 2 SIU officials were “quite helpful in shepherding the [student] through the complaint process...and the officials encouraged the [student] to pursue a formal complaint.”
 - SIU took corrective action such as assigning the Professor to another area of the University, issuing a formal reprimand, requiring sexual harassment training, and making a good faith effort to minimize his contact with the student.

- ▣ Federal court decisions have noted that the affirmative defense for employers may not be available when the harasser is so high up in the managerial structure that he or she may be considered to be the “alter ego” of the University.
 - *EEOC v. Robert L. Reeves & Assoc., P.C.* (C.D. Cal. 2003): The Court found that the founder, chief executive officer, president, director and shareholder of the firm was the firm’s proxy/alter ego and, therefore, the affirmative defense was not available to the firm.

- ▣ In some circumstances, members of the Board or executive management of the University may be considered to be alter egos of the University, such that the University could be held strictly liable for harassment by Board Members or executive management against employees and students without the ability to assert the affirmative defense generally available.

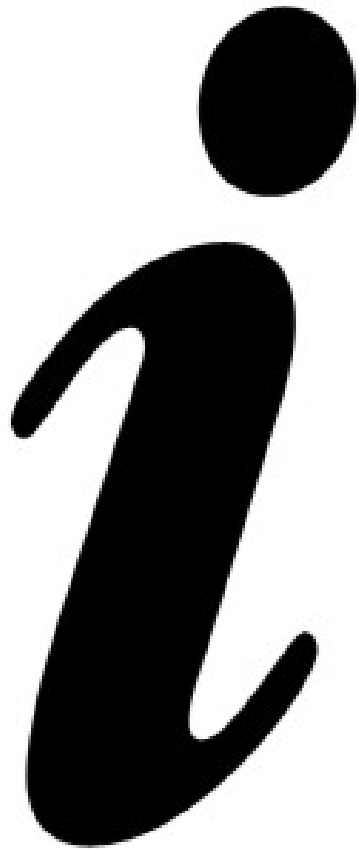
- ▣ Allegations of sexual harassment have profound repercussions for companies.
- ▣ In fiscal years 2010-2016, U.S. employers paid out nearly \$300 million dollars to employees who alleged sexual harassment through the EEOC administrative enforcement process.
- ▣ Recent companies impacted by sexual harassment allegations include:
 - The Weinstein Company
 - Uber
 - Twenty-First Century Fox Inc.
 - Michigan State University
 - Wynn Resorts Ltd.
- ▣ Michigan State University recently agreed to pay sexual assault victims nearly \$500 million dollars in the Larry Nassar case.

Trustees should consider the following questions related to Board engagement on the issue of sexual harassment:

- ▣ Has the Board discussed legal developments and national trends regarding sexual misconduct?
- ▣ Has the Board discussed sexual misconduct and related issues with the University's administrative leadership?
- ▣ Does the Board know what administrators are primarily responsible for legal compliance related to sexual harassment issues?
- ▣ Has the Board reviewed the institution's policies regarding sexual misconduct, including policies that protect the interests of students who bring allegations, and discussed their implementation and efficacy with appropriate administrators?
- ▣ What is the institution doing to monitor its overall climate relative to issues related to sexual misconduct?

“Beyond the standard review of reports, policies, and procedures, a board that is engaged with its administration can be effective in encouraging productive dialogue on sexual misconduct and other issues critical to institutional well-being. Studies show that increased board engagement – characterized by, for example, scrutinizing information, asking difficult questions, challenging assumptions, and introducing innovative ideas – improves the quality of institutional outcomes.”

--Association of Governing Boards
of Universities and Colleges



i

Exercise Independence

Good governance requires that Trustees exercise independence in their decision-making to act in the sole interest of their respective University. Trustees are required to comply with conflicts of interest prohibitions in the Illinois Governmental Ethics Act and individual policies of their respective Universities.

When identifying whether a conflict of interest exists impacting his/her ability to exercise independence, a Trustee should consider the following stages:

- Identifying the conflict; and
- Managing the conflict.

Identifying Conflicts of Interest

- ▣ A conflict of interest arises when a Trustee is required to make a decision where:
 - 1) the Trustee is obliged to act in the best interests of his/her University constituencies; and
 - 2) at the same time, the Trustee has or may have either: (i) a separate personal interest or (ii) another duty owed to a different beneficiary in relation to that decision, giving rise to a possible conflict with the Trustee's duty as a Trustee of the University Board.
- ▣ Conflicts may be classified as real conflicts or potential conflicts.

Managing Conflicts of Interest

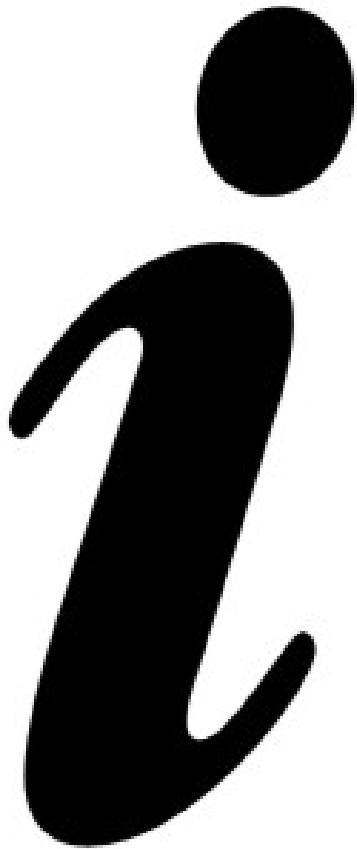
- ❑ Board Members should disclose any actual or potential conflicts of interest immediately upon discovery.
- ❑ Paramount importance because avoiding appearances of conflicts maintains public confidence in the University's institutional integrity as a prudently managed University operated for the sole and exclusive benefit of its members.
- ❑ When managing a conflict, the role of a legal adviser is important to consider how the conflict may affect (or appear to affect) the independence of the Trustee's decision making.
- ❑ A decision taken by a Trustee with a conflict may be invalidated if the Trustee did not take proper steps to manage the conflict.

- ▣ Constituency Interests. Elected or appointed Trustees often have responsibilities toward his or her constituency.
- ▣ *Identify the conflict*: A Trustee's interest in his or her responsibilities to his or her constituency may cause a conflict of interest on a particular matter. Trustees must recognize at all times that the Trustee's obligation is to act in the best interest of the University as a whole and not to a particular constituency that he or she has been elected or appointed to represent.
- ▣ *Manage the conflict*: If a Trustee believes that an interest to his or her constituency may create a conflict, the Trustee is encouraged to seek legal advice before participating in the discussion or vote at issue and disclose the conflict to the Board. Trustees must recognize at all times that the Trustee's duty is to act in the best interest of the University as a whole and not to a particular constituency that he or she has been elected or appointed to represent.

- ▣ Personal and Financial Interests. Trustees (and his or her spouse and/or immediate family member) are prohibited from having a financial or personal interest in contracts or business operations that affect or appear to affect that party's independence, objectivity or loyalty to the University.
- ▣ *Identify the conflict:* possible conflicts include (i) referring any prospective vendor to the University for a specific transaction without Board approval; (ii) engaging in outside employment with any University vendor; (iii) using his or her prestige as a Board Member to encourage the hiring of family members at vendors of the University; (iv) engaging in activities that are incompatible with his or her duties as a Board Member such as using his or her prestige, influence or position with the University to receive any private gain or advantage or divulging confidential or non-public information to any unauthorized person which he or she gains by reasons of his or her role as a Trustee.
- ▣ *Manage the conflict:* The Trustee should notify the Board as soon as possible about the conflict and should seek legal advice regarding appropriate responses to managing the conflict.

ISBE Example

- ❑ Illinois State Board of Education Chairman violated the agency's conflicts of interest policy by participating in discussions and a Board vote relating to Illinois' No Child Left Behind Act waiver application without disclosing his wife's ownership of a supplemental educational services provider to the entities subject to ISBE jurisdiction.
- ❑ The agency's conflict of interest policy specifically prohibited the following types of behavior: (1) Using public office for direct or indirect private gain; (2) giving preferential treatment to any organization or person; (3) losing independent or impartiality of action; (4) making a Board decision outside official channels; or (5) adversely affecting the confidence of the public in the integrity of the Board.
- ❑ OEIG concluded that the Chairman's wife's ownership could "reasonably create the appearance of [the Chairman]'s loss of independence or impartiality. ...Thus, [the Chairman] was required to disclose this interest to the Board when he participated in the Board discussions and vote."



Maintain
Integrity

Good governance requires Trustees to act with integrity in all University decisions.

Boards of Trustees need to operate within the ethical requirements of state laws including the Ethics Act.

Gift Ban

- ❑ The Illinois Gift Ban, codified in the Ethics Act, applies to all Board Members (and Staff) and prohibits Board Members (and their respective spouses/immediate family members) from submitting or accepting any “gift” from a prohibited source.



A “prohibited source” are people or entities that fit one or more of the following categories:

- (1) do or seek to do business with the respective University;
- (2) conduct activities regulated by the respective University;
- (3) have interests that may be substantially affected by the University’s official duties; or
- (4) are registered or required to be registered as lobbyists.

Gifts from prohibited sources do not violate the Gift Ban if they fall under one or more of the following exceptions:

- Gifts available to the public under the same conditions;
- Gifts for which the recipient paid market value;
- Gifts received from a relative;
- Foods or refreshments not exceeding \$75 per day;
- Gifts from one prohibited source with a cumulative value of less than \$100 during any calendar year.

Political Activity

- ▣ The Ethics Act strictly prohibits employees and Board Members from using State resources for prohibited political activity.
- ▣ Ethics Act does not permit any exception for anyone to engage in *de minimis* use of University property for political campaign activities even if the employee:
 - Is a tenured faculty or professor of a State University;
 - Did not think about what they were doing (or not doing);
 - Describes their conduct as an error that was “miniscule”;
 - Used State resources that only represented a fraction of their overall e-mail use; or
 - Did not think about using their personal e-mail as opposed to their State e-mail.

Political Activity Violation

- ▣ Tenured University professors exchanged seemingly innocuous, limited e-mails using both their State University email accounts and their personal e-mail accounts to communicate about a fellow Professor's campaign for Congress. E-mails included:
 - A request and response regarding drafting an introductory speech for the Professor in preparation for a campaign meeting;
 - A list of contact information in order to assist the Professor in sending invitations for a campaign meet and greet;
 - A request and response regarding distributing the Professor's campaign materials at a meeting in Washington D.C.; and
 - A request and response regarding assistance in soliciting campaign donations from other University employees.

- ▣ All of the University professors were required to complete the annual training on the State Ethics Act.
- ▣ The University professors admitted that they knew that “you’re not supposed to” use State e-mail in regards to a political matter but argued that the violation was a “miniscule error” and that they “could not believe time was being wasted on something so trivial”.
- ▣ OEIG responded by finding all of the University professors involved in the e-mail exchanges were in violation of the State Ethics Act.
 - “[a] violation of State law is not a trivial matter. In addition, what is also similarly not trivial, is that a tenured professor, who said she completed ethics training each fall and said she was familiar with the training related to prohibited political activity, nevertheless either intentionally disregarded or simply ignored her annual training.”

Good governance requires Trustees to be knowledgeable of the existence of risks and ensure that proper procedures and processes are developed in advance to address such risks. Ensuring that proper procedures and processes are followed will result in a lasting **impact** on the University's governance.

“Leadership is an action, not a position.” –Donald McGannon