Date: March 6, 2018
Time: 11:30 a.m. – 1:00 p.m.
Location: State Bar of Georgia
Presenters: Jamala McFadden, Carmen Alexander, Raquel Crump, Chandra Davis, Darrell Graham (bios below)

Synopsis: Over the past several months there have been countless stories of sexual harassment scandals, but what isn’t the news telling us? The news has left many companies wondering how these allegations against their favorite celebrities arose and if their company is next. During this CLE, ELS’s team of experienced employment lawyers and EEOC Deputy District Director Darrell Graham will discuss sexual harassment basics and explore less discussed issues in sexual harassment law, including:

- consensual office romance that becomes harassment
- same-sex harassment and female harassers
- investigations and false claims
- sexual harassment claims in the #MeToo era
- gender intelligence as a tool to minimize sexual harassment claims

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**Sexual Harassment: Best Practices for Employers**

**The Basics: What is Sexual Harassment?**

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

It is unlawful to harass a person (an applicant or employee) because of that person’s sex. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or
offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

Consensual Workplace Relationships

- 2 types of consensual relationships: (1) those between co-workers and (2) those between supervisors/managers/bosses and subordinates.

- Very difficult to prevent office romance but employers can be proactive in mitigating liability, disruption, and embarrassment as a result of office romance.

- Regulating Consensual Relationships:
  - Have anti-harassment policies—distribute policies annually as a reminder; make policies easily accessible; have procedures for handling sexual harassment complaints; and conduct training on policies.
  - Have policies that prohibit certain conduct—favoritism, conflicts of interest, and inappropriate interactions or behavior such as public displays of affection (PDA).

- Managing Office Romance When Discovered:
  - Set out expectations to staff—reminder of anti-harassment policies, including sexual harassment; expectation of productive work environment; distraction.
  - For relationships between supervisors and subordinates, consider a lateral transfer for either party involved.

- Prevention of Consensual Relationships

SAMPLE ANTI-FRATERNIZATION POLICY

To avoid the appearance of any conflict of interest, influence, or favoritism, and to ensure objectively in the workplace, the Company prohibits personal relationships (e.g., romantic or dating relationships, cohabitation, marriage, or otherwise becoming related) between employees in a reporting relationship.

If a personal relationship develops between employees in a reporting relationship, the employees must disclose the relationship immediately to the Human Resources Department. The Human Resources Department will work with the employees to devise a working solution.
Any failure to disclose such personal relationships between employees in a reporting relationship to Human Resources may result in discipline, up to and including termination.

All steps will be taken to eliminate any real or perceived appearance of authority one employee has over the other employee. Continued employment is possible provided that no direct reporting relationship exists. In situations where it is not possible to eliminate a real or perceived conflict of interest, transfer or termination of employment with the Company may be required.

- Love Contracts—consensual relationship agreement that documents that the relationship is consensual; effort to mitigate the risk of sexual harassment claims from office romances gone awry.
  - Benefit—gives employer and employees a more comfortable avenue for raising all issues about appropriate workplace interactions.
  - Disadvantage—lack of reporting consensual relationship.

**SAMPLE CONSENSUAL RELATIONSHIP AGREEMENT**

We have entered into a personal relationship outside of work that is completely voluntary and consensual. We have received copies of the company policies relating to sexual harassment and workplace conduct and agree to follow these rules, including refraining from any displays of affection or other inappropriate conduct (e.g., arguments, open hostility) at work or work-related events.

We also agree that there has not been, nor will there be, any claim of sexual harassment for any event relating to our working together prior to signing this document. We understand that we will not seek or accept a position within the organization where one of us reports to the other and that we will remove ourselves from any work-related decisions that may arise involving the other.

Include the following language if employer’s policy allows consensual relationship between supervisors and subordinates:

- [Employee in supervisory position] will not participate in any discussions or decisions related to the terms of [subordinate employee’s] employment, including those related to assignments, evaluations, discipline or discharge, compensation, scheduling, promotion or demotion, and development.
- The employees will not engage in conduct that could reasonably be regarded by co-workers as favoritism.

We also understand that either of us can end the relationship without fear of work-related retaliation and agree to conduct our business at work according to these guidelines. We will notify the company when our personal relationship ends. Additionally, we understand that any violation of company policies or this agreement will be grounds for disciplinary action, up to and including termination of employment.

We understand that any disputes arising from the relationship as it pertains to work issues, including agreeing to this document, will be resolved through mediation, and that we have the right to consult an attorney before signing this document.

With our signatures below, we understand and agree to abide by company policies and will conduct our consensual personal relationship outside of the work environment. We attest that up to the time of signing this document no prior behavior in the relationship has violated company policy.
Non-Traditional Sexual Harassment

- Sexual harassment is illegal regardless if the harasser and victim are of the same sex; if the harasser is female; or if the victim is a youth employee.


- In 2017, 11% of men reported they were victims of sexual harassment—compared to 42% of women.

- Sexual Harassment Against Youth
  - Sexual Harassment laws apply the same to youth employees as they do adult employees.
  - Youth employees are less likely to come forward with complaints of sexual harassment.
  - Do not ignore youth employees—they may fall through the cracks because they work on part-time, temporary, seasonal basis.
  - Employers may sometimes defend sexual harassment claims by addressing their consensual nature. With youth, employers must have an additional consideration in the use of this defense—age of consent of the youth employee.

Gender Intelligence

Avoid #MeToo: Eliminate Sexual Harassment Claims & Increase Gender Diversity Best Practices

- *Conduct Bi-Annual Sexual Harassment & Sex Discrimination Assessments*
  - Companies should conduct Gender Intelligence Assessments that will improve the working environment and reduce sexual harassment claims by adjusting the company’s culture.
    - The average single-plaintiff sexual harassment case costs a company $75,000-$125,000 in legal fees if it goes all the way through trial.
  - Gender Intelligence Assessments include anonymously surveying employees, reviewing sexual harassment and gender policies, focus groups, advice on how to improve the company’s culture and environment for both women and men, and prevention of claims of sexual harassment and gender discrimination.
• Conduct trainings on Equal Employment Opportunity (EEO) Laws, Discrimination, Harassment, Gender Intelligence, and their EEO policies
  - Bridging Gender Communication Gap in the workplace is key
    ▪ recognizing the differences between men and women and valuing and leveraging those differences. This awareness leads to effective interactions in the workplace.
  - Research indicates men and women socialize differently and consequently, have diverse styles of speaking, working in teams, and managing employees
    ▪ Women exhibit rapport talk—indirect style such as apologizing, taking blame, thanks, downplaying authority
    ▪ Men exhibit report talk, such as direct requests, rarely giving praise or compliments, giving advice to solve problems
  - Gender Differences in the Perception of Sexual Harassment
    ▪ Women perceive a broader range of social-sexual behaviors as harassing.
    ▪ Females also see behaviors that involve hostile work environment harassment, derogatory attitudes toward women, dating pressure, or physical sexual contact more than men

Internal Investigations

• Planning Steps
  Step 1: Acknowledge receipt of complaint
  Step 2: Determine the issues
  Step 3: Determine if a formal investigation is necessary
  Step 4: Determine if interim action is necessary
  Step 5: Determine the appropriate person to conduct the investigation
  Step 6: Discuss with management or appropriate Company personnel
  Step 7: Determine who you will interview, the order, and where you will interview them
  Step 8: Gather your supplies
  Step 9: Document preservation

• Mistakes to Avoid
  Mistake 1: Failing to Investigate
  Mistake 2: Delaying
  Mistake 3: Failing to be thorough and documenting
  Mistake 4: Compromising Confidentiality
  Mistake 5: Losing Objectivity
  Mistake 6: Failing to take prompt corrective action
  Mistake 7: Failing to appropriately inform the parties of results
  Mistake 8: Inconsistency
  Mistake 9: Retaliation
  Mistake 10: Invading Privacy

• Risks of a Shoddy Investigation
  ▪ Discontented employees
  ▪ Discord in the work environment
Checklists for Employers

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

☐ Leadership has allocated sufficient resources for a harassment prevention effort
☐ Leadership has allocated sufficient staff time for a harassment prevention effort
☐ Leadership has assessed harassment risk factors and has taken steps to minimize those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

☐ A harassment prevention policy that is easy-to-understand and that is regularly communicated to all employees
☐ A harassment reporting system that employees know about and is fully resourced and which accepts reports of harassment experienced and harassment observed
☐ Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
☐ Accountability for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
☐ Regular compliance trainings for all employees so they can recognize prohibited forms of conduct and know how to use the reporting system
☐ Regular compliance trainings for mid-level managers and front-line supervisors so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

☐ The organization conducts climate surveys on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
☐ The organization has implemented metrics for harassment response and prevention in supervisory employees' performance reviews
☐ The organization conducts workplace civility training and bystander intervention training
☐ The organization has partnered with researchers to evaluate the organization's holistic workplace harassment prevention effort

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

1 From the EEOC's Select Task Force on the Study of Harassment in the Workplace, Co-Chairs Chai R. Feldblum and Victoria Lipnic (June 2016).
☐ An unequivocal statement that harassment based on any protected characteristic will not be tolerated
☐ An easy-to-understand description of prohibited conduct, including examples
☐ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
☐ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
☐ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
☐ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
☐ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
☐ Is written in clear, simple words, in all languages commonly used by members of the workforce

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:
☐ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
☐ Employer representatives who take reports seriously
☐ A supportive environment where individuals feel safe to report harassing behavior to management
☐ Well-trained, objective, and neutral investigators
☐ Timely responses and investigations
☐ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
☐ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
☐ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
☐ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

Structural Principles
☐ Supported at the highest levels
☐ Repeated and reinforced on a regular basis
☐ Provided to all employees at every level of the organization
☐ Conducted by qualified, live, and interactive trainers
☐ If live training is not feasible, designed to include active engagement by participants
☐ Routinely evaluated and modified as necessary

Content of Compliance Training for All Employees
☐ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
☐ Includes examples that are tailored to the specific workplace and the specific workforce
☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
☐ Explains the consequences of engaging in conduct unacceptable in the workplace

Content of Compliance Training for Managers and First-line Supervisors
☐ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

** These checklists are meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace and responding to harassment when it occurs. They are not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.
<table>
<thead>
<tr>
<th>Risk Factor</th>
<th>Risk Factor Indicia</th>
<th>Why This is a Risk Factor for Harassment</th>
<th>Risk Factor-Specific Strategies to Reduce Harassment*</th>
</tr>
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<tr>
<td>Young workforces</td>
<td>Significant number of teenage and young adult employees</td>
<td>Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.</td>
<td>Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.</td>
</tr>
<tr>
<td>Workplaces with &quot;high value&quot; employees</td>
<td>Executives or senior managers Employees with high value (actual or perceived) to the employer, e.g., the &quot;rainmaking&quot; partner or the prized, grant-winning researcher</td>
<td>Management is often reluctant to jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.</td>
<td>Apply workplace rules uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).</td>
</tr>
<tr>
<td>Workplaces with significant power disparities</td>
<td>Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, e.g., administrative support staff, nurses, janitors, etc. Gendered power disparities (e.g., most of the low-ranking employees are female)</td>
<td>Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.</td>
<td>Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.</td>
</tr>
<tr>
<td>Workplaces that rely on customer</td>
<td>Compensation directly tied to customer satisfaction or client service</td>
<td>Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.</td>
<td>Be wary of a &quot;customer is always right&quot; mentality in terms of application to unwelcome conduct.</td>
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2 From the EEOC’s Select Task Force on the Study of Harassment in the Workplace, Co-Chairs Chai R. Feldblum and Victoria Lipnic (June 2016).
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<td>Workplaces where work is monotonous or tasks are low-intensity</td>
<td>Employees are not actively engaged or &quot;have time on their hands&quot;&lt;br&gt;Repetitive work</td>
<td>Harassing behavior may become a way to vent frustration or avoid boredom.</td>
<td>Pay attention to relations among and within work groups with monotonous or low-intensity tasks.&lt;br&gt;Consider varying or restructuring job duties or workload to reduce monotony or boredom.</td>
</tr>
<tr>
<td>Isolated workplaces</td>
<td>Physically isolated workplaces&lt;br&gt;Employees work alone or have few opportunities to interact with others</td>
<td>Harassers have easy access to their targets.&lt;br&gt;There are no witnesses.</td>
<td>Consider restructuring work environments and schedules to eliminate isolated conditions.&lt;br&gt;Ensure that workers in isolated work environments understand complaint procedures.</td>
</tr>
<tr>
<td>Workplaces that tolerate or encourage alcohol consumption</td>
<td>Alcohol consumption during and around work hours.</td>
<td>Alcohol reduces social inhibitions and impairs judgment.</td>
<td>Train co-workers to intervene appropriately if they observe alcohol-induced misconduct.&lt;br&gt;Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed.</td>
</tr>
<tr>
<td>Decentralized workplaces</td>
<td>Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors</td>
<td>Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules.&lt;br&gt;Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.</td>
<td>Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be.&lt;br&gt;Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction&lt;br&gt;Develop systems for employees in geographically diverse locations to connect and communicate.</td>
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Presenters

Jamala S. McFadden is experienced in assisting employers identify, minimize, and resolve employment law issues in routine business operations, litigation, and mergers and acquisitions. She is an alumna of Sutherland Asbill & Brennan where she practiced for more than nine years. She began her legal career as a law clerk to a federal judge. Jamala earned her B.A. from the University of Illinois and her law degree from the University of Michigan Law School where she was an Executive Editor of the *Michigan Law Review*. Jamala is admitted to practice in Michigan, Illinois, and Georgia. Contact: imcfadden@theemploymentlawsolution.com; 678.424.1381

Carmen R. Alexander has 17 years of litigation and legal experience. She has significant experience in labor and employment law, serving as staff and senior attorney for the Office of the Fulton County Attorney and as a trial attorney for the U.S Department of Labor, Solicitor’s Office. She also served as an EEO consultant to the City of Augusta, where she handled EEO complaints and investigations. Carmen has written numerous position statements in response to EEOC charges and has drafted investigative reports, findings, and recommendations. Carmen is also a registered neutral for the State of Georgia and has mediated nearly 150 magistrate court matters through the Justice Center of Atlanta. Contact: calexander@theemploymentlawsolution.com; 678.756.8016

Raquel H. Crump began her legal career with an employment law firm in Florida, handling employment discrimination complaints and unemployment claims. Since joining ELS, Raquel has gained jury trial experience and has first chaired administrative trials. She has conducted workplace trainings; responded to EEOC Charges, RFIs, and attorney demand letters; and researched and analyzed various federal and state employment laws. Raquel earned her B.A. from the University of North Carolina at Chapel Hill and her law degree from Florida A&M University College of Law. She is admitted to practice in Georgia, Florida, and D.C. Contact: rcrump@theemploymentlawsolution.com; 404.981.7691

Chandra C. Davis began her career as a law clerk to federal district and appellate court judges. As an associate with McGuireWoods, Chandra handled employment matters on behalf of Fortune 500 companies. She provided general advice and counsel, investigation services, and training to senior-level management and HR professionals. She served as a trial attorney with the EEOC for four years. Chandra earned her B.A. from Emory University and a M.Ed. from the University of Georgia. She earned her law degree from the University of Michigan Law School where she served as an editor of the *Michigan Law Review*. Contact: cdavis@theemploymentlawsolution.com; 404.387.4165

Darrell Graham is currently the Deputy Director of the U.S. Equal Employment Opportunity Commission’s Atlanta District Office. Prior to this recent appointment, he was Director of EEOC’s Richmond Local Office. Mr. Graham is formerly an administrative judge with the Commission. Mr. Graham received his Bachelor’s Degree in Political Science from the University of California at Berkeley and his Juris Doctorate degree from Washington University School of Law. Upon graduation from law school, he focused on antitrust and commercial litigation matters and eventually established a practice focusing primarily on civil rights litigation. Mr. Graham is a former adjunct professor, having taught criminal law courses to upper-division students at the University of Missouri at St. Louis prior to commencing work with the Equal Employment Opportunity Commission as a trial attorney. In addition to having served honorably for six years in the U.S. Air Force, Mr. Graham has received myriad awards and recognition over the years related to his educational, professional, and civic endeavors.
About The Employment Law Solution:

The Employment Law Solution: McFadden Davis, LLC (“ELS”) is a boutique employment law firm based in Atlanta, Georgia. We partner with Fortune 500 and smaller employers to help identify, minimize and resolve workforce-related legal matters.

ELS’ team of six lawyers have gained experience in AmLaw 100 law firms, corporate and government law departments, the Equal Employment Opportunity Commission, the Department of Labor, representing individuals, and as federal law clerks. Our experience, coupled with sharper focus and greater pricing flexibility than most large firms, makes our business model ideally suited for employers who demand high-quality legal services on a cost-effective basis.

ELS’ services include defending employers in class and collective actions, single-plaintiff employment litigation and federal and state agency proceedings. We conduct workplace investigations and train employees on employer policies and workplace laws. We also offer proactive advice and consulting, compliance guidance, and audit services. We have comprehensive experience handling issues concerning harassment, discrimination, retaliation, wage and hour, leave, accommodation, social media, workplace safety and labor unions, among others. Finally, we frequently partner with other law firms as co-counsel, subject matter employment counsel and in joint venture relationships.

ELS’ representative clients include: Macy’s, Inc., AT&T, WorldPay, City of Atlanta, Atlanta BeltLine, Fulton County Government, DeKalb County Government, The Krystal Company, Northside Hospital, and the Federal Home Loan Bank Atlanta, among others.

ELS is a woman and minority-owned business certified by the Women’s Business Enterprise National Council (WBENC), the Georgia Minority Suppliers Development Council (GMSDC), and the National Association of Women and Minority Owned Law Firms (NAMWOLF).

For more information about ELS’s services, please visit us our website at www.theemploymentlawsolution.com or call 678.424.1380.