

# Kennebec Valley Human Resources Association Legal Update



**KVHRA**

**Kennebec Valley Human  
Resources Association**

**APRIL 10, 2018**

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ATTORNEYS AND COUNSELORS AT LAW

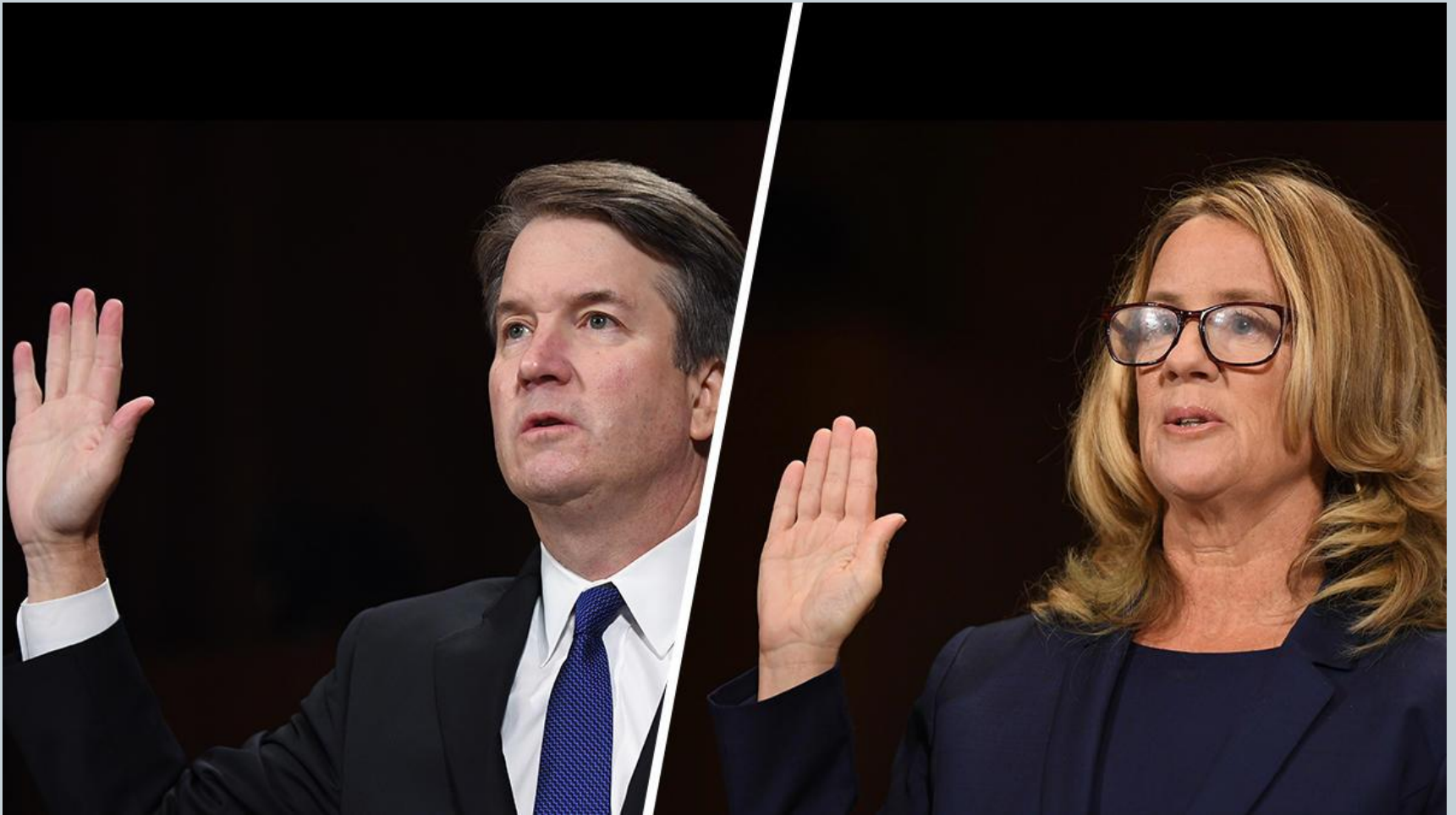
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# Today's Agenda



- 1. #MeToo- what it means for you
- 2. Background checks- staying legal
- 3. Compensation history legislation
- 4. Other new legal “stuff!”
- 5. Workplace drug policy
- 6. Separation / severance agreement

# In the Spotlight



# The Employer's Defense



- Employer not liable... when no adverse employment action when
  1. Employer took reasonable steps to prevent and promptly correct sexual harassment, and
  2. the employee unreasonably failed to take advantage of the employer's preventative or corrective measures.
- Known as the Farragher defense



# Employer's Anti-Harassment Checklist

Policy

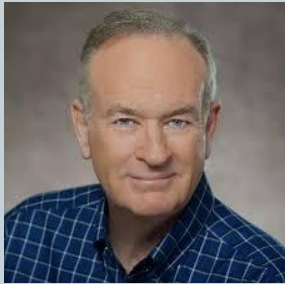
Poster

Annual Notice

Training (video)



# Has it Worked?





# Closer to Home



**maine.**  
THE MAGAZINE®

LOCAL & STATE > Posted April 28 | Updated April 30

INCREASE FON

## Former Maine Magazine publisher faces sexual harassment allegations

Jessie Lacey, a former employee, says Kevin Thomas kissed her without her consent and eventually forced her to resign.

LOCAL & STATE > Posted May 1 | Updated May 2

INCREASE FONT

## Former Maine magazine publisher apologizes for 'lines that were crossed' with woman who worked for him

LOCAL & STATE > Posted May 3 | Updated May 4

## Fallout from allegations of 2010 sexual harassment still plaguing Maine Media Collective

# Still, Close to Home



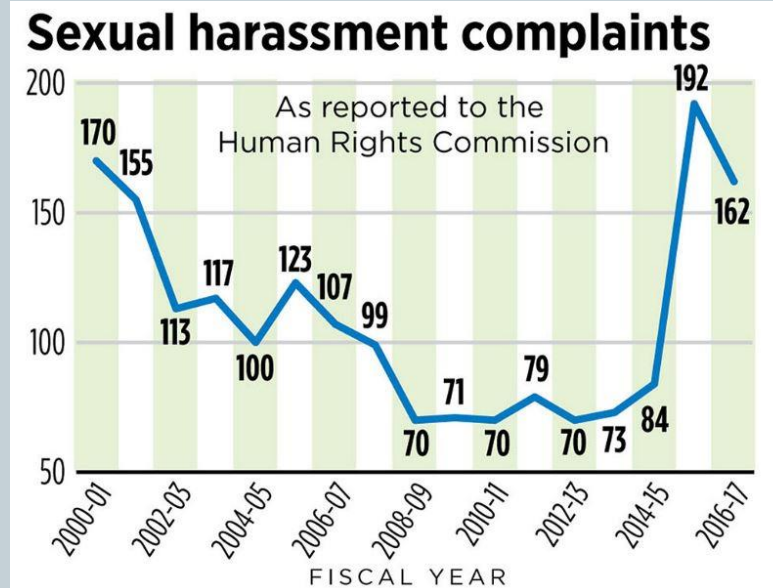
LOCAL & STATE >

Posted November 28, 2017 | Updated November 29, 2017

INCREASE FONT SIZE **PA+**

## State fumbles data as sexual harassment complaints double

The Maine Human Rights Commission says it doesn't know why the numbers rose so dramatically, hitting an all-time high of 192 complaints filed in fiscal 2016.



Murphy, Edward D. "State Fumbles Data as Sexual Harassment Complaints Double." Press Herald, 29 Nov. 2017, [www.pressherald.com/2017/11/28/sexual-harassment-complaints-in-maine-doubled-in-last-two-years/](http://www.pressherald.com/2017/11/28/sexual-harassment-complaints-in-maine-doubled-in-last-two-years/).



# Lessons Learned



- **Headline material**
- **The importance of proactive and preventative measures**
- **The perils of a perceived cover-up**
  - No investigation
  - Botched investigation
  - Settlements seen as “hush money”
- **Guilty until proven innocent?**

# Room for Improvement

Training

Policy

Accountability

Transparency

Investigation



# Training Requirements for Maine Employees



- Educate and train new employees within 1 year of start
- Training includes:
  - Written notice of illegality of sexual harassment
  - Definition of sexual harassment
  - Description of sexual harassment (using examples)
  - Internal complaint system
  - Legal and complaint process through Maine Human Rights Commission
  - Protections against retaliation

# Training Requirements for Maine Employees cont.



- Train new supervisors within one year of start
  - Their responsibilities
  - How to take immediate and appropriate corrective action
- Record keeping
  - Record of all employees trained
  - Kept for at least 3 years

# Training Tips



- Respectful workplace workshop
- Live workshop
- Leadership engagement in workshop
- Focus on culture not liability
- Interactive
- All forms of harassment
- Separate leadership session
- Address “HR as Fun Police”



# Accountability and Transparency



- Significant consequences for harassment
- Report outcomes to impacted employees
- Evaluate principals / assistant principals based on respect, civility, and responsiveness to complaints
- Annual summary reports of harassment enforcement?





# Current Sexual Harassment Policies



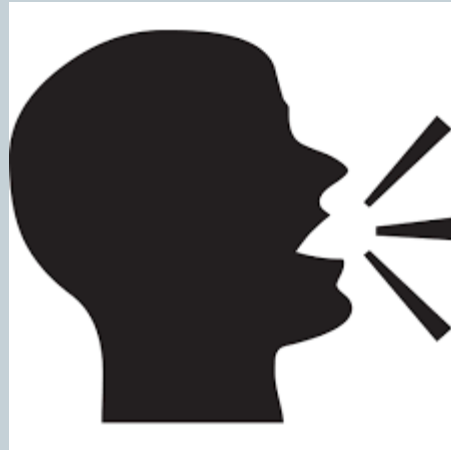
- Too legalistic
- Written in the 80's (and tweaked)
- Formulaic



# Harassment Policy Ideas



- **Plainer language**
  - We know it's hard to come forward. You may fear retaliation... that's understandable.
  - But if you don't speak up, it won't stop
- **Q&A format**
  - What will happen?
  - Could I lose my job?
  - Will he/she be fired?



# What to Expect in the Wake of #MeToo



- More claims?
- Tougher climate for claims
- Scrutiny of confidentiality terms
- Tax consequences of settlements
- Training mandates
- Skepticism of arbitration
- Potential for wrongful termination and defamation claims.



# Background Checks



- State laws provide applicant protections
- Individualized assessment of applicant
  - Severity of conviction
  - Recency of conviction
  - Relationship to job
  - History and rehabilitation
- “Handy Handout”



# Compensation History



- Maine recently passed a bill which bars an employer from asking a prospective employee about salary history until after an offer of employment has been made
- Employers may seek salary history after an offer of employment has been made, and may confirm a prospective employee's compensation history if it is voluntarily disclosed without prompting
- The law also forbids employers from preventing employees discussing or disclosing other employee's wages

# Other New Legal “Stuff”



- Minimum wage increase to \$11/hour, \$12/hour in 2020
- Paid medical leave bills
- Marijuana law
- Ban the box- vetoed by Gov. LePage, but could see support under Mills



# Workplace Drug Policy



- Address legal and illegal drugs
- Impairment
- Medical marijuana
- Recreational marijuana
- Applicants
  
- \*Handy Handout



# Severance / Separation Agreements



- When to use?
- What to include?
- The risk of “hush money” payment

# Severance / Separation Agreements



- **Include:**
  - The obvious (release etc.)
  - Reference letter
  - No rehire
  - Confidentiality
  - Non disparagement
  - Arbitration