

# Virginia Dealer University

## The Me Too Movement, Marijuana and Other Labor Law Updates

By



P.O. Box 1848  
Bristol, Tennessee 37621  
(423) 764-4127  
(423) 764-5869 (Fax)

web site: [www.sescomgt.com](http://www.sescomgt.com)  
e-mail: [sesco@sescomgt.com](mailto:sesco@sescomgt.com)



# Section 1

---

## **The Me Too Movement and the Impact on Employers**



# Changing Demographics

---

- The U.S. population is 326 million.
- Growth in Hispanic and Asian populations is predicted to almost triple over the next 40 years.
- By 2055, it's estimated to be 48% White, 24% Hispanic, 14% Asian, and 13% Black.



# Changing Demographics

---

- 21% of the population is over the age of 55.
- 27% of the population is under the age of 21.
- Approximately 50.9% of today's workforce are women.



# Changing Demographics

---

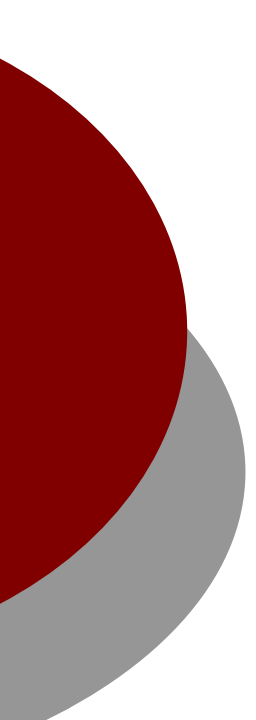
- Millennials, whom we define as those ages 22-37 in 2018, now number 75.4 million, surpassing the 74.9 million Baby Boomers (ages 55-73).
- 51% of American children under the age of 5 are minorities.
- The top 4 religious affiliations are Catholic (25%), Baptist (25%), Methodist (5%), Presbyterian (5%), other (40%)



# Who's Protected?

---

- Sex (include harassment and pregnancy)
- Race
- Color
- National Origin
- Age (40 and over)
- Religion
- Disability
- Marital Status
- Military/Veterans Status

- 
- 
- It's just not sex harassment
  - However, sex harassment is the most common type of harassment.
  - The second most common EEOC charge (retaliation is #1).



# Harassment- The Law

---

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

- Harassment is unwelcome conduct that is based on :
  - Race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
  - Harassment becomes unlawful where
    1. enduring the offensive conduct becomes a condition of continued employment, or
    2. the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.





# Harassment- Employer Liability

---

- The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.
- The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.
- When investigating allegations of harassment, the EEOC looks at the entire record.



## Legal Standard For Employer Liability

---

- If harasser is a manager/supervisor of the victim and the harassment results in a tangible employment action against the victim -
  - = EMPLOYER IS STRICTLY LIABLE for the harasser's acts.



## Legal Standard For Employer Liability

---

- Harassment by a manager or supervisor that does not result in a tangible employment action against victim
  - = EMPLOYER IS LIABLE UNLESS IT CAN PROVE THAT IT:
    - (1) exercised reasonable care to prevent and promptly correct any harassing behavior; and
    - (2) the victim unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.



## Legal Standard For Employer Liability

---

- Harassment by coworkers or by non-employees with whom the victim had contact as a result of his or her employment
  - = EMPLOYER IS LIABLE IF IT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE of the harassment and failed to take immediate and appropriate corrective action to address the situation.

# 5 Elements of Sexual Harassment

---

Sexual Harassment is -

1. Deliberate or repeated
2. Unsolicited
3. Verbal comments, gestures, or physical contact
4. Of a sexual nature
5. Which is unwelcome.

## Is it or Isn't it?

---

- *Suzie is a repair technician for the local office equipment company. She's noticed Pat in your office and has started hanging around his desk and flirting whenever she's in the area. She's even offered him discounts on repair services for your office if he'll go out with her. Pat isn't interested and has tried to tell her but she won't take the hints. Suzie is now leaving love notes and waiting for him at the parking lot after work.*



## Is it or Isn't it?

---

- *Joe has a private office and a computer assigned to him. You are Joe's supervisor. Your IT staff informs you that the office's network management software has detected that Joe's computer has been used to visit explicit sexually-oriented web sites. Joe admits that he has visited these sites during his personal time before and after work and at lunch.*

## Is it or Isn't it?

---

- *Robert is a happily married man. For their anniversary, his wife had her portrait taken at Le Scandal photo gallery. He has this photo proudly displayed on his desk.*





# The specific forms of harassment

---

- Quid Pro Quo
- Consists of:
  - Something for Something
- Usually occurs within the context of a supervisor-employee relationship



# The specific forms of harassment

---

- Hostile Work Environment
- Consists of:
  - Severe and pervasive conduct
  - Unreasonable interference with an individual's job performance
  - Offensive, intimidating, hostile work environment
- Can be created by anyone in the workplace



# The specific forms of harassment

---

- Hostile Work Environment
- Considerations
  - How frequent is the conduct?
  - How severe is the conduct?
  - Is the conduct physically threatening, humiliating, or merely an offensive utterance?
  - Does the conduct unreasonably interfere with an individual's work performance?



# What isn't Sexual Harassment?

---

- The stray remark
- The overly sensitive employee
- Consensual relationships



# Who can commit Sexual Harassment?

---

- Supervisors
- Co-workers
- Customers
- Vendors
- Outside third parties (i.e. UPS driver)



# Who can experience Sexual Harassment?

---

- Direct targets of harassment
- Bystanders
- Witnesses



# Sexual Harassment Defined

---

- EEOC defines Sexual Harassment as:

*“Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”*



# Sexual Harassment Realities

---

- There were 13,055 charges of sexual harassment in 2018.
- Sexual Orientation or association is now grounds for harassment/discrimination.
- 15.9% of sexual harassment charges were filed by males in 2018, according to the EEOC.



# Examples of Potentially Sexual Harassing Behavior

---

## Verbal

- Referring to an adult as a girl, stud, doll, babe, honey, or as “fine”, “hot”, “sexy” etc.
- Whistling at someone; cat calls.
- Making sexual comments about a person’s body, clothes, looks, anatomy, or manner of walking, etc.
- Making sexual comments or innuendos.
- Turning work discussions to sexual topics.
- Telling sexual jokes or stories.
- Asking about sexual fantasies, preferences, or history.
- Repeatedly asking a person out who is not interested.
- Telling lies or spreading rumors about a person’s personal sex life.
- Playing sexually suggestive music.



# Examples of Potentially Sexual Harassing Behavior

---

## Non-Verbal Harassment

- Looking a person up and down (elevator eyes).
- Staring at someone.
- Blocking a person's path.
- Following a person around.
- Giving personal gifts.
- Displaying sexually suggestive visuals (calendars, pictures, comics, food displays).
- Making sexual gestures with hands or through body movements.
- Making facial expressions such as winking, throwing kisses, or licking lips.

# Examples of Potentially Sexual Harassing Behavior

---

## Physical

- Giving a neck or shoulder massage.
- Touching a person's hair, clothing, or body.
- Hugging, kissing, or patting.
- Standing close or brushing up against a person.
- Touching or rubbing oneself sexually around another person.
- Unwanted deliberate touching, leaning over, cornering, or pinching.
- Actual or attempted rape or assault.



## Is My Intent the Same as the Impact?

---

- To determine if your behavior could be unwelcome to another person, remember that “unwelcome” is decided by the recipient of the behavior, not the person doing the behavior.
- Therefore, it is the **impact** of behavior, not the **intent** of the person who did the behavior, that determines if sexual harassment has occurred.



**If no one complains about sexual harassment I don't need to worry, right?**

---

**WRONG**



# Possible Warning Signs Of Sexual Harassment In Your Workplace

---

- Employers can be liable for workplace harassment if they know or should know that it is occurring. A manager's knowledge of misconduct is imputed to the employer for purposes of establishing liability.
  - Look for these warning signs and advise management if you observe any of them:



# Warning Signs

---

- Material of a sexual nature found posted (even if in restrooms or break rooms etc.).
- A department or area where swearing or sexually oriented language is regularly used.
- A noticeable change in the behavior of an employee, including, but not limited to, tardiness, absenteeism, and mood swings.
- An employee who avoids another employee, or shrinks from another employee's physical proximity.



# Warning Signs

---

- Openly sexual behavior between employees, even if it seems welcome. For example, sitting on each other's laps while another employee is scowling or not smiling.
- A group that frequently engages in after-work partying.
- Unprofessional behavior during business trips or conventions.





# The Role of the Supervisor/Manager

---

- Prevention of sexual, unwelcome, harassing conduct in the first place.
- When it occurs take immediate corrective action before it becomes severe and pervasive.
- Spot it, stop it (if within your power/responsibility), document it, pass it on to HR, legal, your supervisor so formal investigation and action can occur.
- Encourage the reporting employee to follow all policies.



# Hypotheticals

---

You've worked with your subordinate Mary for many years and she's always been a good employee. Lately, though, she seems somewhat distracted and unhappy. When you finally sit her down and ask what's wrong, she reluctantly explains that one of the other supervisors has repeatedly propositioned her despite the fact that she isn't interested and has told him as much each time it happened.

When you tell her you will report her complaint to the office manager, she becomes visibly upset, begs you not to say anything and says that she wants to handle it her own way. What should you do?



# Hypotheticals

---

During her lunch breaks, one of your employees talks on her cell phone to friends and the discussion often revolves around the employee's dates. Sometimes, the discussion gets pretty "racy." The employee always lowers her voice in an effort to be discreet, but some of this talk is overheard by her coworkers, who eventually complain to you.

Since the conversations were personal and not intended to be overheard, do you have an obligation to do anything in response to the complaints?



# Hypotheticals

---

One of your employees complains to you that every time your donor Mr. Jones comes to the office, he asks her out and tries to pinch her on the behind. She says she is offended and wants the conduct to stop.

Mr. Jones is married, a prominent member of the community, and has given you a lot of money over the years. What do you do?



# Hypotheticals

---

You've recently hired a new assistant, Betty, and she happens to be very attractive. You find yourself occasionally engaging in a little harmless flirtation with her which she seems not to mind.

Unfortunately, Betty's job performance is not as outstanding as her looks, and eventually you and the office manager have to sit down with her to counsel her about her performance.

Within a week, Betty's made a complaint to the office manager that you sexually harassed her and she's threatened to file a complaint with the Equal Employment Opportunity Commission (EEOC). What should you do?



# Hypotheticals

---

It's been a rough week at the office and everyone is ready for the weekend. A group of your subordinates, mostly the opposite sex, approach you Friday afternoon and invite you to happy hour at a nearby bar.

- Is there anything wrong with meeting them for a drink outside of work?
- Should you go but not have anything alcoholic to drink?
- Can an employer be liable for conduct that occurs outside of work?
- What steps should you take to protect yourself if you do decide to go?



# A Manager's Survival Guide

---

- Do not tell racial, sexual, religious, etc. jokes or use racial epithets even in jest.
- Do not tolerate subordinates telling such jokes or using such epithets in your presence.
- Do not ever touch a subordinate for any reason (No pats, kisses, hugs, back rubs, etc.)
- Do not go out drinking with subordinates, but if you do, do not be the last one to leave.
- Do not ever visit a subordinate's home (unless you are accompanied by your spouse).



## A Manager's Survival Guide

---

- Do not call a subordinate at home unless you have a legitimate business reason.
- Do not engage in a personal relationship with a subordinate.
- If you are already in a relationship with a subordinate, notify your Manager or other appropriate member of upper management.
- Do not ignore rumors of harassment or complaints that may come to you secondhand.
- Treat employees the way you would want your spouse, partner, or child treated.





# Sexual Harassment Mastery Test

---

1. Asking a co-worker out on a date is sexual harassment.
2. Conduct of a sexual nature must be severely or pervasively offensive as perceived by the standard of a "reasonable person" in order to be judged as hostile environment sexual harassment.
3. If a manager makes an employee's promotion conditional on sexual favors, this type of sexual harassment is called supervisory misconduct.
4. One of the best ways to stop sexual harassment is to simply ignore the harasser.



# Harassment Test

---

5. Under the Civil Rights Act of 1964 (Title VII), employment discrimination is prohibited on the basis of sex, among other protections.
6. Sexual harassment can only occur in the workplace during working hours.
7. Howie, facilities service supervisor, posts calendars featuring nude women in his office that no one comes to. The calendars are protected under Free Speech.
8. The laws prohibiting sexual harassment provide protection against retaliation, but only for those found to have been victims of sexual harassment.



# Harassment Test

---

9. The federal Equal Employment Opportunity Commission has issued guidelines which explain that sexual harassment is a type of discrimination based on sex.
  
10. Under the 1998 U.S. Supreme Court decisions, every employer should have a policy against sexual harassment and a complaint procedure.



# Harassment Test

---

11. Rod is the life of the lunchroom and loves to tell dirty stories to his friends and co-workers. He does not intend to offend anyone by telling his jokes. Rod's behavior:

- is unprofessional but no cause for concern
- should be encouraged since it builds morale and no one has complained
- cannot be sexual harassment, since he does not intend to offend
- could contribute to a hostile and offensive working environment



# Harassment Test

---

12. Sexual harassment only occurs when the harasser is male.
13. It's sexual harassment to tell a co-worker of the opposite sex that he/she looks nice.
14. In some circumstances, a single isolated incident of harassment may create a hostile and abusive environment.



# Harassment Test

---

15. Helen, VP of Finance, is dating Jonathan, an accountant working in her department. Their relationship may not be against company policy. It also:

- can lead to legal problems for both Helen and her organization
- is legal
- is not prudent
- all of the above



# Act Like the Management Representative You are at all Times

---

- At all times, your own conduct should be above reproach. your example will communicate to your subordinates what is acceptable behavior and what you will condone. if you do not set high standards, no one else will.
- **THERE IS SUBSTANTIAL EVIDENCE THAT WHERE MANAGEMENT EXEMPLIFIES AND ENFORCES ANTI-HARASSMENT POLICIES, SUCH BEHAVIORS DECREASE.**



## Section 2

---

### **Marijuana and Substance Abuse in the Workplace**





# Substance Abuse and Cost to the Employer

---

- Employers are losing approximately \$100 billion a year through:
  - Lost Productivity
    - \$81.6 billion due to premature death (37 billion) and illness (44 billion)
  - Absenteeism
  - Healthcare Expenses



# Cost to the Employer

---

- **WORKERS' COMPENSATION:** 38% to 50% of all Workers' Compensation claims are related to substance abuse in the workplace; substance abusers file three to five times as many Worker's Compensation claims.
- **MEDICAL COSTS:** Substance abusers incur 300% higher medical costs than non-abusers.
- **ABSENTEEISM:** Substance abusers are 2.5 times more likely to be absent eight or more days a year.
- **LOST PRODUCTIVITY:** Substance abusers are 1/3 less productive.
- **EMPLOYEE TURNOVER:** It costs a business an average of \$7,000 to replace a salaried worker.



# Unseen Reality

---

**Think workplaces are drug free? Think again.**

- 73% of drug users are employed
- Almost one in ten employees has a substance abuse problem
- 24% of workers admitted to drinking during the workday at least once in the past year
- 15% of U.S. workers report using alcohol or being impaired on the job in the past year



# Unseen Reality

---

## *The Problem: Substance Abuse in the Workplace*

- 60% of the world's production of illegal drugs is consumed in the U.S.
- Nearly 1 in 4 employed Americans between the ages of 18 - 35 have illegally used drugs.
- 1/3 of employees know of the illegal sale of drugs in their workplace.
- 20% of young workers admit using marijuana on the job.



# Unseen Reality

---

- Individuals who abuse drugs or alcohol are three and a half times more likely to be involved in a workplace accident compared to individuals who do not abuse drugs or alcohol
- 47% of industrial injuries are directly related to alcohol abuse or alcoholism
- Drug users seeking employment target employers who *do not* conduct pre-employment drug screening

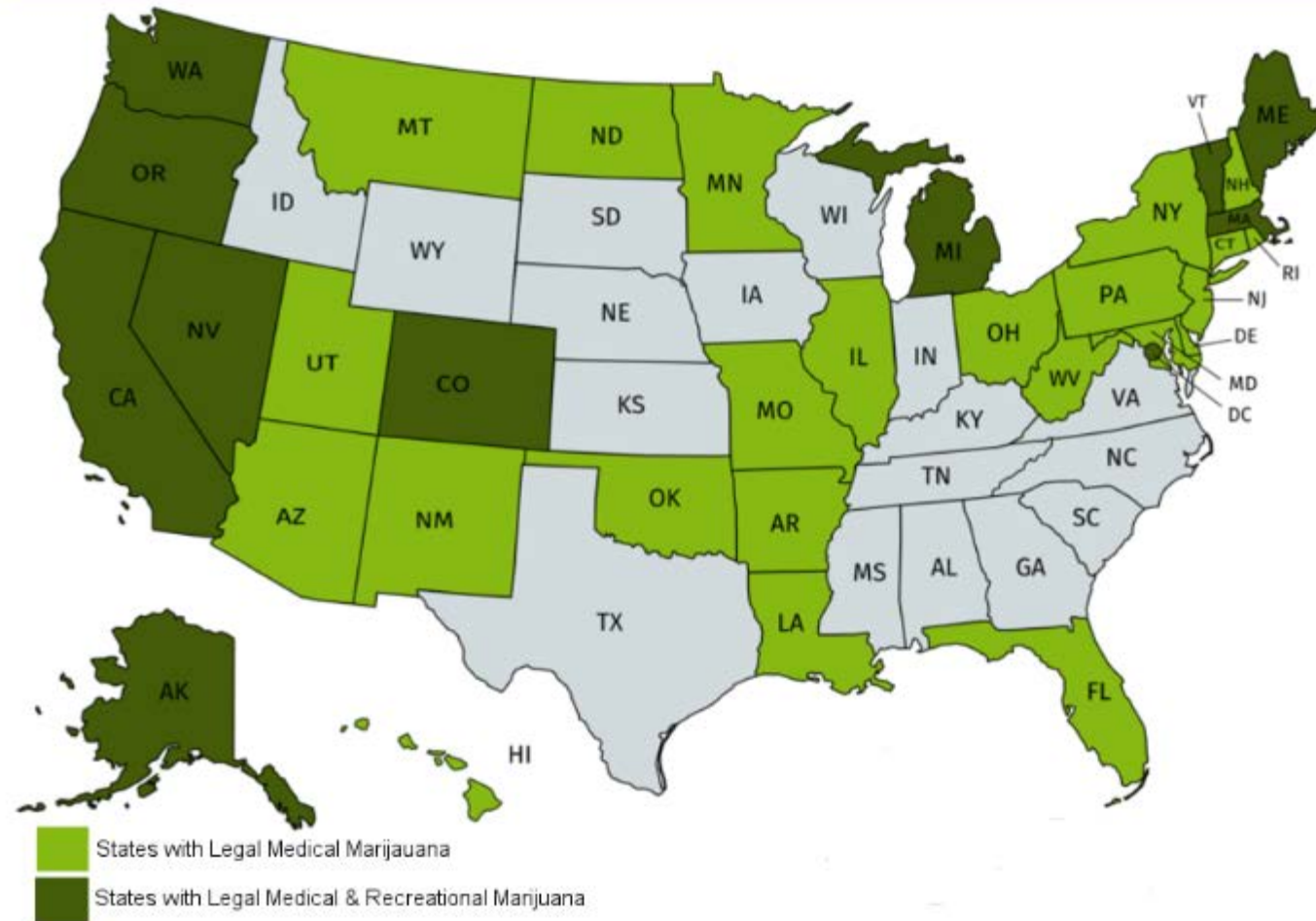


# Marijuana - The Movement

---

- Marijuana is still **illegal** on a federal basis
- 10 states and DC have legalized recreational use
- 33 states and DC have legalized some form of medical marijuana

## 33 Legal Medical Marijuana States & DC 10 Legal Recreational Marijuana States & DC





# Marijuana: A Primer

---

- THC can be detected weeks after ingestion
- Testing can indicate ingestion within 4-6 hours
- Unlike alcohol, there is no accepted test available to determine impairment





# Building a Policy

---

## Considerations for Your Drug Policy

- Who will be subjected to testing
- What conduct is prohibited
  - Drinking/drugging on the job
  - Being impaired on the job – regardless of prescription
  - Failing to disclose that they may be impaired or have a prescription
- Consequences for engaging in prohibited conduct
- Periods in which the prohibitions apply
- Circumstances in which testing will occur
  - Random?
  - Reasonable suspicion?
  - Others?



---

## **Considerations for Your Drug Policy**

- Testing procedures
  - Competent professional
- Effects of drugs/alcohol
- Signs and symptoms of a substance problem
  - Supervisory training



# Pre-Employment

---

- 57% of employers conduct applicant testing
- Employer normally required to pay
- Post offer – pre start date



# Random Testing

---

- Employees selected for testing “at random” without any reason to believe they are actively using drugs or abusing alcohol.
- Random selection by computer-generated random number or similar process.
- Random is required for DOT
- **Think twice about implementing random testing**



# Reasonable Suspicion Testing

---

- Reasonable suspicion testing is lawful and strongly suggested.



# Examples Reasonable Suspicion

---

- Personal observation of an employee's conduct, appearance, behavior, speech or odor.
  - E.g., watery eyes, slurred speech, unsteady posture.
- Information regarding an employee's conduct, appearance, behavior, speech or odor obtained from a reliable sources, or that is independently corroborated.
- Possessing drugs or alcohol on one's person.
- Being in an area to which access is limited and the odor of marijuana is present.



# General Signs of Under the Influence

---

- Abrupt changes in attendance, quality of work and production
- Unusual outbreaks of temper
- Acting paranoid or confused
- Not taking responsibility for actions
- Changes in attitude/mood
- Withdrawing from family and friends



# General Signs of Under the Influence

---

- Drastic change in physical appearance
- Changes in grooming habits
- Associating with known drug users
- Has more/less money than usual
- Acting secretive with both actions and possessions





## What is NOT Reasonable Suspicion

---

- Merely being “associated” with someone who is known to use drugs, absent additional reliable information suggesting drug use on the part of the suspected employee.
- Unsubstantiated rumors of drug or alcohol use.
- Poor job performance, standing alone, is not sufficient to give rise to a “reasonable suspicion” of drug use.



## Other Types of Drug Testing

---

- **Return to Duty Testing** – Testing an employee upon returning from a medical leave.
- **Follow Up Testing** – Testing of an employee who has previously tested positive or has otherwise been found to have abused substances, to assure compliance with substance abuse treatment program or “stay sober” mandate.
- **Post Accident Testing** – Testing of an employee immediately following an accident involving or caused by the employee.



# Best Practices for Employer Drug Policies

---

- **Policy should address prescription medication** that may affect employees' ability to work safely and competently
- **Consequences** for refusal to submit to test



# Developing a Drug-Free Workplace Program

---

- Develop a comprehensive policy
- There are many reasons to put your policy in writing
  - Written policy may be required by law or insurance carrier
  - Written policy makes legal review possible
  - Written policy provides record of the organization's efforts
  - Written policy is easier to explain to employees and supervisors
  - Putting the policy in writing helps place emphasis on the importance of the company's intentions



# Basic Elements of an Effective Policy

---

- Your organization's goals and reasons for developing and implementing a drug-free workplace policy
- What does your company define as substance abuse?
- What employee behaviors are expected?
- Exactly what substances and behaviors are prohibited?
- Who is covered by the policy?
- What type of testing will be implemented, re: pre-employment, post accident, reasonable suspicion and/or random?
- What are the consequences of refusing or failing a test?



# Typical Client Questions

---

- I received an anonymous tip that a certain employee is using drugs. Should/can I test that individual?
- I saw a picture of an employee drinking and smoking pot on a Facebook picture. Can I test them?
- Is it worth the cost of conducting pre-employment drug testing?



# Typical Client Questions

---

- If I suspect someone is under the influence at work or post workplace injury, should I personally drive them to the medical facility to conduct the test?
- If someone is driving a company vehicle, has an accident, should I test them?
- If the individual tests positive, could I be liable for the accident, injury or even death?



# Typical Client Questions

---

- If an employee provides me a copy or proof of prescriptions, do I have to allow them to work?
- If I use temporary employees through a third party agency, am I liable for their illegal use?
- Subsequent a positive drug test, can I require an employee to complete and Employee Assistance/Rehabilitation Program?





# Typical Client Questions

---

- An employee's wife called for her husband's absence stating that he had been arrested for DUI. What should we do at this point?
- An employee tested positive and is adamant that the test was wrong and that they've never used the drugs that they tested for. What should I do at this point?



## **Section 3**

---

### **New Wage-Hour Regulations**



# New Wage Hour Regulations

---

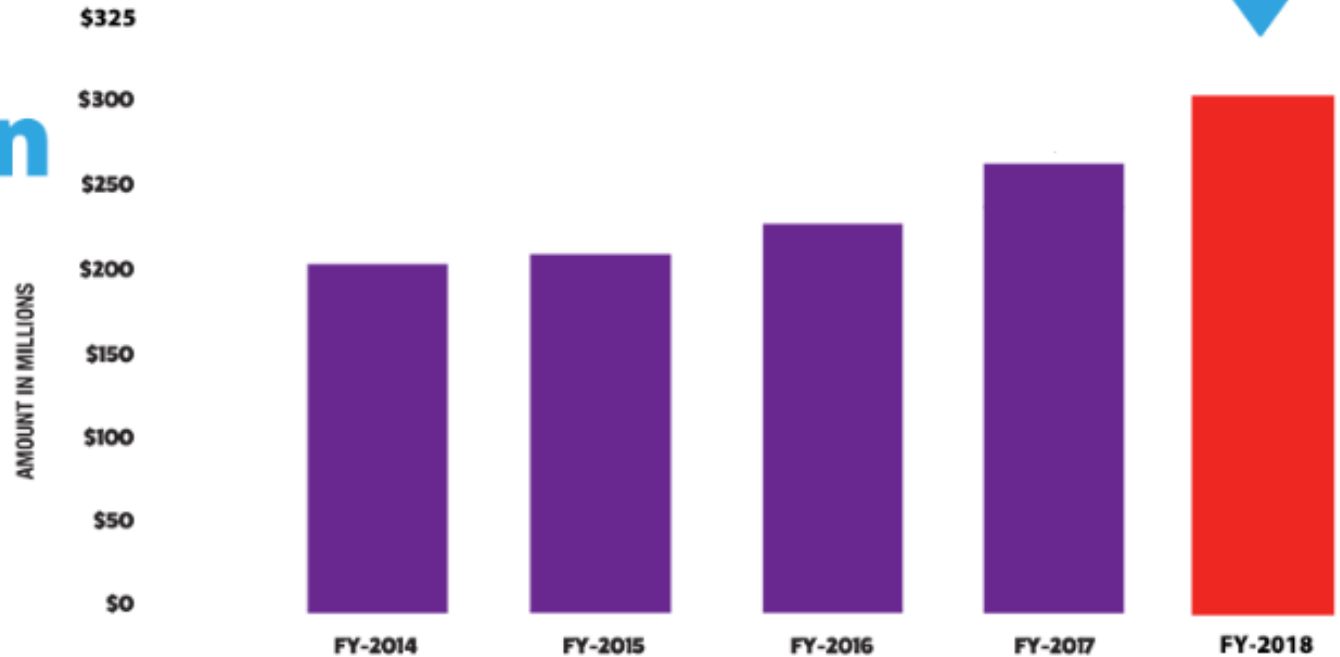
- Starting January 2020, new **exempt salary level is**  
\$679 per week - \$35,308 per year
- Current salary requirements are \$455.00 per week or \$23,660 per year.
- Increase of \$224.00 per week  
\$11,648 per year
- Represents 33% increase

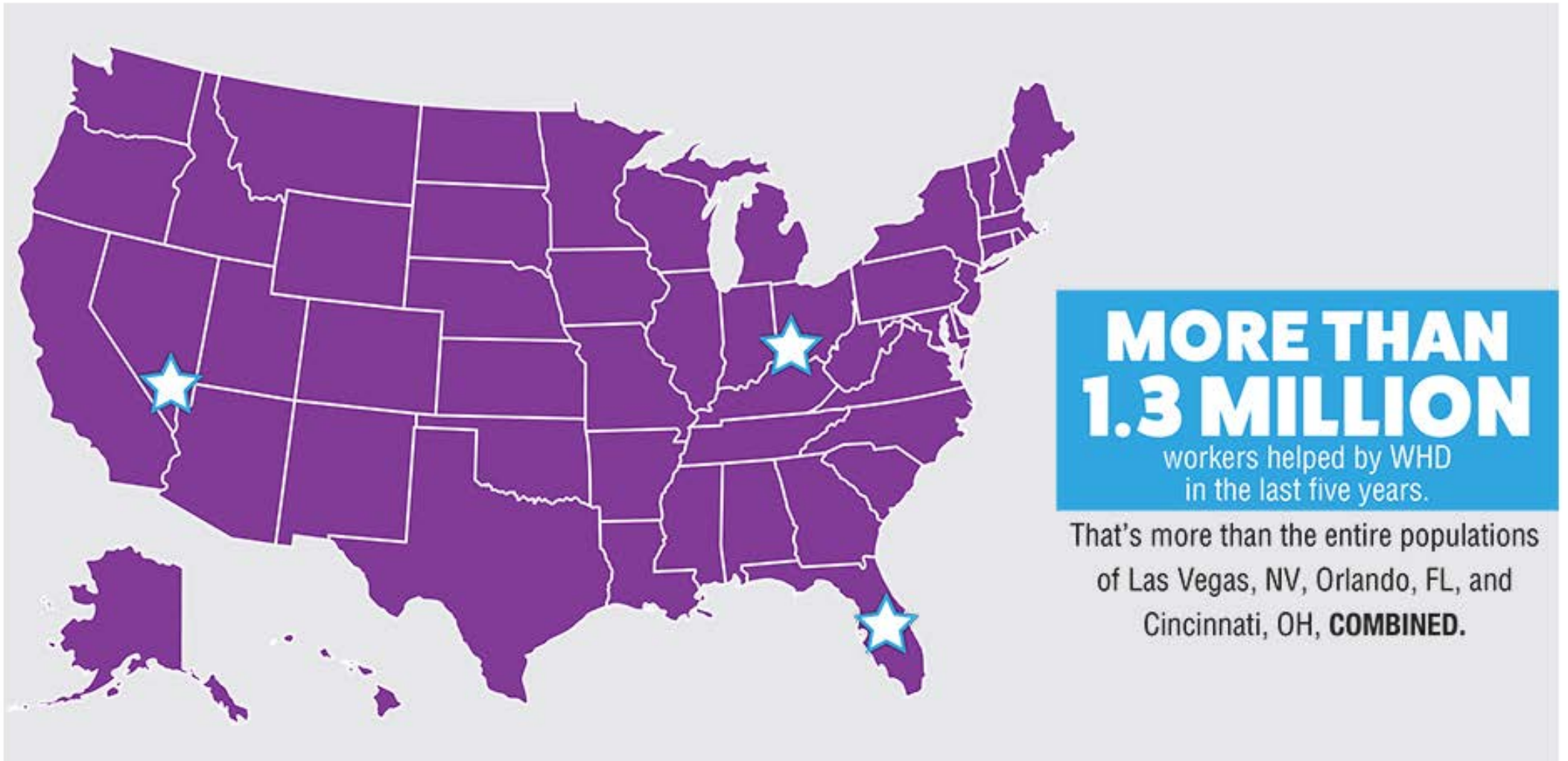
RECORD BACK WAGES COLLECTED

WHD Recovered a  
RECORD  
\$304 Million

in wages owed  
to workers in  
FY2018

\$304 Million






**MORE THAN  
1.3 MILLION**

workers helped by WHD  
in the last five years.

That's more than the entire populations  
of Las Vegas, NV, Orlando, FL, and  
Cincinnati, OH, **COMBINED.**

MORE THAN  
**\$1.3 BILLION**  
in back wages recovered by WHD  
in the last five years

 = \$5,000,000



# WHD Enforcement Statistics

---

	<b>FY 2018</b>
<b>Back Wages</b>	\$304,914,114
<b>Employees Receiving Back Wages</b>	265,027
<b>Complaints Registered</b>	19,534
<b>Enforcement Hours</b>	1,113,213
<b>Average Days to Resolve Complaint</b>	100
<b>Concluded Cases</b>	28,397



# Trends in FLSA Litigation/Action

---

- FLSA lawsuits
  - Four (4) year liability
  - Attorney fees
- FLSA violations/liability/fines #1 in 2018





# FLSA Basics

---

- **Non-Exempt** employees must:
  - receive minimum wage - \$7.25
  - maintain an accurate time record
  - receive overtime at time and one-half hours worked in excess of 40 hours per week
- Unless **exempt**



# White-Collar Exemptions

---

- Executive Exemption
- Administrative Exemption
- Learned Professional Exemption
- Creative Professional Exemption
- Computer Exemption
- Outside Sales Exemption
- Highly-Compensated Employees



# White-Collar Exemptions

---

- **Executive Exemption**

- Management - 51% of work time
- Manager - 2 or more employees
  - Hire/Fire
  - Performance Reviews
  - Discipline
- General Manager
- New/Used Care Manager
- Service Manager



# White-Collar Exemptions

---

- **Administrative Exemption**

- Independent Discretion and Judgment – 51% of work time
- Does not perform regular and recurring work, re: accounting
- Controller
- CFO
- Full-time HR Manager



# White-Collar Exemptions

---

- **Learned Professional Exemption**
  - 4 Year Professional Degree
  - Doctors, RN's with 4 year degrees
- N/A



# White-Collar Exemptions

---

- **Computer Exemption**
  - Programmers/Analysts
  - Not Help Desks, Network Administrators, Webmasters
- N/A



# White-Collar Exemptions

---

- **Outside Sales Exemption**
  - Engaged in Sales
  - “Outside” 51% of work cycle
  - No guaranteed salary
- N/A



# White-Collar Exemptions

---

- **Highly-Compensated Employees**
  - Guaranteed \$147,414 or more annually – Jan, 2020 (currently \$100,000)
  - Independent Discretion/Judgment
- F&I Manager





## SESCO Staff Recommendations

---

- Review your current salary-exempt positions and simply identify those who make less than \$35,308 per year
- Request/require these positions to maintain an accurate record of time starting now.
- Determine whether or not these incumbents who make less than \$35,308 work in excess of 40 hours per week.



## SESCO Staff Recommendations

---

- If overtime is worked, determine if hours of work can be reduced to 40.
- If the position is required to work over 40 on a regular basis, then you will need to determine whether or not you wish to increase the salary in one fell swoop to the minimum requirement, \$35,308
- If this increase is not practical, you will need to determine whether or not you wish to implement a nonexempt pay plan- re hourly rate with overtime.



# Options

---

- Do nothing – roll the dice
- Increase salary to \$35,308
- Convert to a hourly rate with overtime
- Consider the Fluctuating Workweek Method of Payment

# Fluctuating Workweek Method of Payment

---

- Guaranteed salary for all hours worked
- Half-time paid for hours worked in excess of 40 hours per week
- Example:

Weekly salary		\$679.00
Total hours worked	÷	45
<hr/>		
Regular Rate		\$15.08
Half-time rate		\$7.54 (\$15.08 x .5 hours overtime)
<hr/>		
Overtime due		\$38.02 (7.54 x 5 hours OT )

**Note: Payroll providers are not normally aware of or compliant to the Fluctuating Workweek Method of Payment.**

# Fluctuating Workweek Method of Payment

---

- Department of Labor Coefficient Table can be used to compute the additional half-time in one quick calculation
- Example - 45 hours - Coefficient .056
- $.056 \times \$679 = 38.02$  overtime due
- Employer/employee must have a Letter of Understanding acknowledged by the employee that they understand the pay plan



# Myth

---

- **Paying someone on a salaried basis does not mean they are exempt**
- Exemption status is only determined by actual job duties/requirements **and** guaranteed salary



# Automotive 13(b)(10) Exemption

---

1. Exempt from overtime only
2. Must make minimum wage and keep a time record
  - Sales (not BDC or Internet)
  - Mechanics (not Lube, Tire, Oil, Get Ready)
  - Parts – on counter
  - Service Advisors



## Retail 7(i) Sales

---

- 51% or more of earnings are derived from a commission
- Must average \$10.88 per hour ( $\$7.25 \times 1.5$ )
- F&I Managers
- BDC
- Paint/Body





---

# **Common FLSA Violations/Traps**



# Trap #1

---

- **Misclassifying Non-Exempt Employees As Exempt**
- **Examples**
  - “Managers” performing non-exempt work as a primary duty
  - Administrative employees non-exempt:
    - Office Managers
    - Accountants
    - Marketing Personnel
    - IT Technicians/Help Desk
    - F&I Managers
    - Estimators
    - Warranty Clerks



## Trap #2

---

- **Employees cannot waive their rights**



## Trap #3

---

- **What are ‘Hours’ Worked?**
  - Break time
  - Travel time
  - Meetings
  - Training



## Trap #3

---

- Working lunches
- Pre-work
- Home work
- Unauthorized overtime



## Trap #4

---

- **Not Calculating the Regular Rate Properly**
  - Not including all “work” time as defined-travel time as a key example
  - Non-discretionary bonuses
  - Averaging workweeks
  - Comp time

## Trap #5

---

- **Improper Pay Deductions – Below Minimum Wage**
  - Loans – call them advancements
  - Equipment breakage
  - Not returning equipment/materials/uniforms



# Trap #6

---

- **Misclassification of Independent Contractors**
  - Improper classification
    - Tax liability
    - Workers' comp liability
    - Overtime liability
  - DOL actively pursuing misclassifications





# SESCO's Staff Recommendations for Compliance

---

- Issue policy on clocking time by other employees
- Policy for mispunches/edits
- Manager sign handwritten time entries
- Edit time records before paying



# SESCO's Staff Recommendations for Compliance

---

- Implement rounding policies
- Conduct annual compliance audits of exemption status and pay plans
- Policy for lunches, after hours work, overtime

# Program Conclusion

---

*“Thank you for your attention and participation”*

**423-764-4127**

**bill@sescomgt.com**



**Bill Ford, President & CEO**

**SESCO**  
management consultants