

Preventing Sexual Harassment In The Metaverse Workplace

By **Timothy Taylor** (May 23, 2022)

We're told the metaverse is the tsunami of the future, a collection of virtual wonderlands where we'll live, work, play and fly around on jetpacks[1] — all very awesome. But, sigh, the operative word for our purposes today is work.

And make no mistake, the world of work is coming to the next iteration of the internet. Chipotle has even set up a virtual restaurant in gaming platform Roblox where you can roll virtual burritos and exchange them for real ones — at least on National Burrito Day.[2]



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What Is the Metaverse?

The metaverse is an umbrella term for many emerging technologies that promise a more immersive online experience and a more connected and secure online economy.

It includes virtual reality worlds experienced with a headset — and gloves, and headphones and one day perhaps an entire suit; augmented reality technologies, where digital information is projected into the real world; and new forms of commerce, including digital currencies and nonfungible tokens, like digital clothing and artwork.

Companies are setting up shop in the metaverse. Often this is through virtual real estate platforms: places like The Sandbox, Decentraland and Cryptovoxels that have a map and sell virtual parcels of land, with prime pieces going for hundreds of thousands of real dollars.[3] On that virtual land, an enterprise can build anything that its programmers can imagine.

For instance, virtual platform Decentraland recently hosted Metaverse Fashion Week, where luxury brands like Etro and Dolce & Gabbana set up runways, concerts and afterparties to show off digital-only outfits.[4]

Meanwhile, a survey of The Sandbox's map reveals virtual land claims taken by performers like Snoop Dogg and Steve Aoki for concerts and hangouts, as well as by video game makers like Atari for fun and games.[5] And of course, crypto exchanges and NFT minters are ubiquitous.

Why do it? Because the metaverse offers new ways to attract customers — and their wallets. Through metaverse events and permanent virtual storefronts, companies can increase customer engagement with their brand and open a new revenue stream through sales of digital assets.

With time, metaverse technologies might also offer new and better ways to connect and train employees. But as with the internet in its nascency, we can't yet foresee all the ways metaverse technology might change how we work, think, play and do business. As put by business analyst Tuong Nguyen, "The 'I-don't-know' bucket is by far the biggest bucket of use cases." [6]

Fictional works like "Snow Crash," "Total Recall," "Tron," "Ender's Game," "The Matrix," "Ready Player One" and the "Persona" series show the promise and the perils of immersive

cyberspace.

And our own metaverse may be subject to very real employment problems.[7] One of those problems is sexual harassment.

In this article, we discuss a legal framework for understanding employment-based sexual misconduct in the metaverse, and what companies can do to mitigate their risk of metaverse-based sexual harassment claims.

Two Competing Frameworks for Metaverse Sexual Misconduct

There has been media coverage of incidents of sexual hostility in the metaverse. Some of the coverage has used the language of sexual assault.

That's understandable. The metaverse is intentionally immersive. And avatars are a ready stand-in for our actual selves, so even though we understand in principle that we're not really there in the metaverse, its overwhelming sensory stimulation, and its coalescence with our mind and identity, can make it feel very real indeed.

Some critics, however, have a ready rejoinder: It feels real, but it's not actually real; an avatar is not your body.

Avatars get shot to pieces in Fortnite and blown sky-high in Halo Infinite. A person might find it unpleasant to be attacked in the metaverse, including in a sexual way, but nothing has actually happened in the real world, and no legal damage has been done — unless we want to start suing Call of Duty players for wrongful death.

A Legal Framework for Sexual Misconduct in the Metaverse

Both of these approaches have weaknesses. Critics are correct that an attack on one's virtual representation in cyberspace is not an attack on one's physical body. But they incorrectly dismiss the psychological harms and objectively offensive aspects of sexual misconduct in the metaverse.

Meanwhile, proponents of a sexual assault model are correct that sexual misconduct in the metaverse can cause real and even visceral anguish. But an element of nearly all claims for battery, sexual assault and the like is an actual physical touching of the victim's body.

An alternative, and perhaps more appropriate, legal framework for sexual misconduct in the metaverse workplace is that of sexual harassment. Sexual harassment includes unwelcome communications, gestures and depictions of a sexual nature. And these are essentially the same in the metaverse.

A sexually inappropriate spoken or written statement in the metaverse can be harassing, just like one uttered face to face, or in a text or email. A sexual gesture in the metaverse can be harassing, just like sexual gestures in the real world. Today, handsets and VR goggles let a person control the hands and head of their avatar with precision; tomorrow, who knows what technology will be available.

In fact, given their purposely closer correspondence to the real world, these modes of communication in the metaverse are even more easily analogized to in-person interaction than their electronic cousins of email, text and social media.

What about unwelcome avatar-on-avatar contact? Even at its most egregious, there is no actual physical contact, so generally it wouldn't rise to the level of sexual assault or battery, as opposed to sexual harassment. Avatar-on-avatar behavior is still essentially notional, a form of communication.

With that said, the metaverse can make avatar behavior particularly impactful. As discussed above, the metaverse is purposely immersive and can blur actual reality and virtual reality in a person's psychological experience. So when a person's avatar is touched or worse, it can have a visceral impact — symbolic communication, but with amplified physiological oomph.

Other aspects of the metaverse may further heighten the impact of avatar behavior. For one, part of what makes the metaverse immersive is the sense of place — of not just being there, but being somewhere.

We use the word "environment" metaphorically when talking about online things. But typical metaverse environments are not metaphorical: They are places with buildings, floors, a sky, objects and so on, through which your avatar moves. It is more like the real world and wholly unlike like a web-browsing or social media experience.

That geographic aspect can be combined with a physics engine, common in video games, that allows its participants to interact with the environment in realistic ways. For avatars, that can mean picking up a teacup, throwing a ball or hopping onto a train. But it could also mean pushing a fellow avatar, blocking its movement and so on.

A geographic environment where one has limited ability to move, just like the real world, combined with physics-governed avatar interactions, could add to the sense of realism — and of pseudo-physical violation — when those interactions go bad.

A second aspect of the metaverse to consider is that people's avatars there, especially in the work environment, are more likely to be representative of who they are, both in physical appearance and in psychological identification.

In virtual reality geared toward amusement, a selling point is escapism: It's fun to have an alter ego unlike your boring real self and more like, say, Channing Tatum.[8] But in a metaverse work environment, you're expected to project your true identity into a virtual space to better reach coworkers, customers, clients and others.

And with technology that can map human faces in three dimensions with uncanny accuracy — think Mark Hamill in "The Mandalorian" or Keanu Reeves in Cyberpunk 2077 — our metaverse identity might soon be close to our real self indeed.

Harassment of that avatar, so close to our true selves, can be particularly visceral and offensive.

These unique features of the metaverse may heighten employer exposure for harassment claims in several ways when compared to previous online infrastructure.

First, liability risk may be heightened because the metaverse combines both the isolating separateness of the internet with the intimacy of in-person interaction.

The online disinhibition effect is just what it sounds like: Some people write things online that they would never say to the other person's face, and act in ways online that they would

never act in the real world. Yet the immersive nature of the metaverse may make harassment particularly impactful.

The U.S. Supreme Court observed nearly 30 years ago in its 1993 *Harris v. Forklift Systems Inc.* decision that sexual harassment requires both objectively offensive behavior and that it be experienced subjectively as such.[9] The metaverse may foster both elements.

Second, the metaverse may heighten employer exposure to vicarious liability for failing to take reasonable steps to prevent or stop harassment. Because the metaverse is technology-based, it opens up numerous features that can exacerbate or mitigate sexual misconduct.

It also may place a duty on employers to select an appropriate metaverse platform for work. Dereliction of these duties may result in liability — more on that below.

Third, the metaverse may heighten employer exposure to damages from harassment. Part of the job of a plaintiff's attorney is to help the jury empathize with his or her client. Now consider what might happen in a future courtroom:

Your honor, I move to admit exhibit 101, the recording of the sexual incident from my client's perspective. And with your permission, I'd like to display it to the jury.

Granted. Ladies and gentlemen, please put on your VR headsets.

Having a jury experience literally firsthand what happened to the plaintiff may leave an extraordinary psychological imprint, with high emotions leading to high damages.

Fourth, the metaverse may heighten employer exposure to other causes of action. Perhaps the most prominent of these is intentional infliction of emotional distress.

As noted above, psychological harm is perhaps more easily experienced from interactions in the metaverse than through previous types of online activity. And due to the ease of recording things online, it also may be easier to prove than in-person interactions.

Finally, all these risks are heightened further if haptics are used. Haptic technology engages the sense of touch.[10] Haptic suits are under development that can deliver full-body stimulation, including feelings of smoothness or roughness, hot or cold, dry or wet, and kinetic impacts.[11]

The legal imagination runs wild at the possibilities for catastrophe. Key for our purposes is that haptics may allow a plaintiff to cross the line from communication — mere harassment — to touch, which could comprise assault and worse.

It is black-letter law that battery does not require someone to physically contact another person's body with their own.[12] It is sufficient to cause an offensive touching, such as by throwing water or siccing one's dog at a victim[13] — or, perhaps, by activating unwelcome sensations in another person's haptic vest.

What Is a Good Company to Do?

Companies considering metaverse workplaces can protect employees through several layers of controls. These include the platform layer, i.e., which metaverse services a company chooses to use; the virtual workplace layer, i.e., how a company sets up its workspace on that service; and the compliance layer.

At the platform layer, companies should carefully consider the features of various metaverse platforms, including what tools are available to prevent sexual harassment and monitor online behavior. Platforms with insufficient protections could potentially expose employers to claims of vicarious liability for selecting a platform negligently.

Prevention tools can include barriers that allow workers to block audio, text or even the virtual presence of unwelcome others; virtual bubbles that prevent avatars from getting uncomfortably close to each other; rules for who can and cannot go into particular virtual spaces; and progressive disabling features that, for instance, prevent avatars from using their hands when they approach each other.

Monitoring tools can include options to record text, audio and visual interactions in the metaverse — though such tools must be used carefully and in accordance with license agreements, applicable privacy laws and biometrics laws.

Employers should also review the platform's terms of service, its general code of conduct, its procedures and track record for dealing with toxic users, and the frequency of toxic and harassing events on the platform.

In short, companies should perform due diligence to ensure they are not setting up shop in a seedy district of the metaverse.

At the virtual workplace layer, companies should maintain a professional work environment. This too can be considered part of the company's duty of care to prevent and be aware of harassment.

Actions can include opting for the platform tools mentioned above that will protect workers from unwelcome interactions with coworkers, as well as clients, customers and the public.

Companies should also consider carefully which tools and features not to use. Take haptics for instance. Haptics offer the promise of useful applications for training, work, fitness and fun. But in the wrong hands, so to speak, haptics could also offer liability.

The virtual workplace itself should be conducive to professional behavior. In the metaverse, a workplace need not be limited to drab cubicles — but maybe the IT team shouldn't be working from a Star Destroyer either.

Companies should also remember that sexualized posters and the like, which can create a hostile work environment in the real world, can do the same in the metaverse.

And companies should also consider extending their usual rules for professional appearance and dress to their workers' avatars, consistent with anti-discrimination laws. This might help counter the online disinhibition effect. Rules around professional appearance help remove anonymity, and may encourage workers to act like their real selves rather than their after-hours alter ego on GTA Online.

Finally, at the compliance layer, companies need to continue managing the actual human beings who work for them. Metaverse workplace problems are, in the end, human problems. But companies can take many actions to prevent these problems.

They can update their employee handbooks, employment agreements and policies to clearly apply to the metaverse. They can put into place clear rules about metaverse conduct,

including disciplinary rules. They can define what is considered the workplace and work time in the metaverse to avoid legal gray zones analogous to after-work happy hours. They can undertake training specific to the metaverse. And they can have clear protocols for investigating instances of metaverse sexual harassment.

The Future of the Future

In 1995, Bill Gates appeared on "The Late Show With David Letterman." Letterman asked about "this internet thing ... what the hell is that exactly?"^[14] In the exchange that followed, Letterman joked about how his radio, phone and magazines covered pretty much anything the internet had to offer.

We may be at the same point now with the metaverse. We don't know exactly where it will lead. But as metaverse platforms continue to improve and grow in popularity, our virtual lives will change in breathtaking ways — and so will the workplace. Companies should be thinking now about how to leverage metaverse technology, and how to protect their workers in it.

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[1] @JaduAVAs, Twitter (Sept. 7, 2021, 4:04 PM), <https://twitter.com/jaduhologram/status/1435333080521183234>.

[2] @ChipotleTweets, Twitter (Apr. 7, 2022, 6:31 PM), <https://twitter.com/ChipotleTweets/status/1512196295389184000>.

[3] See Prabhjote Gill, "Battle of Metaverses: The Sandbox, Decentraland and CryptoVoxels See Sales Surge as Companies Look to Get in on the Ground Floor," Business Insider India (Dec. 24, 2021), <https://www.businessinsider.in/investment/news/the-sandbox-decentraland-and-cryptovoxels-see-sales-surge-as-companies-look-to-get-in-on-the-ground-floor/articleshow/88137990.cms>.

[4] See Maghan McDowell, "Metaverse Fashion Week: The Hits and Misses," Vogue Business (Mar. 29, 2022), <https://www.voguebusiness.com/technology/metaverse-fashion-week-the-hits-and-misses>. Virtual clothes for real people is the fascinating flipside of an earlier trend of companies modeling real clothes on virtual people. See, e.g., Dan Crawley, "Final Fantasy's Lightning Turns Louis Vuitton Model," VentureBeat (Dec. 29, 2015), <https://venturebeat.com/2015/12/29/final-fantasys-lightning-turns-louis-vuitton-model>.

[5] See The Sandbox, Map, <https://www.sandbox.game/en/map>.

[6] See, e.g., Mary K. Pratt, "10 Examples of the Metaverse for Business and IT Leaders," TechTarget (Apr. 5, 2022), <https://www.techtarget.com/searchcio/feature/Examples-of-the-metaverse-for-business-and-IT-leaders>.

[7] To plumb the depths of human virtual depravity, just look at the early days of Ultima

Online. 5 stories of murder and theft that prove Ultima Online was one of the best MMOs ever | PC Gamer.

[8] "Channing Tatum Cameo in Free Guy," YouTube (Sept. 24, 2021), <https://www.youtube.com/watch?v=EXp0hNvZog0>.

[9] See *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[10] The first mainstream example of haptics we can think of is the Nintendo 64's Rumble Pak, released in 1997 to our young self's Star Fox-playing delight. The PlayStation 5's controller, released with the new console in 2020 (both of which our now-mature self purchased last Christmastime strictly for legal-research purposes), has won numerous awards for its advanced haptic feedback.

[11] James Purtill, "'Haptic Feedback' Virtual Reality Teslasuit Can Simulate Everything from a Bullet to a Hug," ABC Science (Mar. 31, 2021), <https://www.abc.net.au/news/science/2021-04-01/vr-teslasuit-simulates-virtual-reality-touch-haptic-feedback/100030320>.

[12] Restatement (Second) of Torts § 18 cmt.c (1965).

[13] *Id.*

[14] "What is [sic] Internet? Explained by Bill Gates 1995," YouTube (Nov. 17, 2019), https://www.youtube.com/watch?v=gipL_CEW-fk.