

## New York State's Sweeping Sexual Harassment Training Mandate

On April 12, 2018 New York Governor Andrew Cuomo signed the state budget, which mandates employers provide employees with annual sexual harassment training. Employers must provide the training and a written anti-harassment policy to employees **starting October 9, 2018**.

### **Contents of the Sexual Harassment Policy:**

The new law requires employers to adopt a sexual harassment policy which:

- Prohibits sexual harassment and provides examples of prohibited conduct
- Includes information concerning Federal and State sexual harassment laws and mentions there may be applicable local laws
- Includes a standard complaint form
- Includes a procedure for the timely and confidential investigation of complaints including due process for all parties
- Informs employees of their rights of redress and available forums for adjudicating claims administratively and judicially
- Clearly states sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory management who knowingly allow such behavior to continue
- Clearly states retaliation against individuals who complain of sexual harassment or who testify or assist in any proceedings is unlawful

The policy must be provided to employees in writing. Employers would be wise to include this policy in their orientation package. New York employers should informally and formally routinely remind employees of this policy.

### **Topics Training Must Cover:**

Employers must also provide interactive training that includes:

- An explanation of sexual harassment
- Examples of sexual harassment
- Information concerning the Federal and State laws concerning sexual harassment and remedies available to victims
- Information concerning employees' rights of redress and forums for complaints

Notably, the new law does not define what it means for the training to be interactive.

The New York State Division of Human Rights is required by the law to produce a model sexual harassment prevention guidance and sexual harassment prevention policy that is publicly available. Employers must adopt this policy or adopt an equivalent one. Likewise, the Division of Human Rights is required to create a model training program, which employers may use or adopt their own.

*The state agencies have yet to create these materials and no specific date of their availability has been provided.*

Although there is no record keeping requirement under the law, employers would be wise to track their employees' attendance at the training. This type of evidence is helpful in the event an employer finds itself defending against allegations of sexual harassment.

Employers in New York should also note the new law expands protection to non-employees. In other words, employers have the obligation to protect vendors, contractors, etc. from sexual harassment. In the past, this was the obligation of the vendor's employer; now it is your obligation! This is a far reaching expansion of the law and exposes employers to a new class of additional liability.

The New York State law also prohibits non-disclosure clauses in any settlement or other agreement regarding sexual harassment, unless the condition of confidentiality is the complainants' preference. How "complainant's preference" is established is an interesting and unanswered question.

This prohibition on non-disclosure agreements means employers will no longer be able to settle these types of cases in secret. The bill further requires the complainant be given 21 days to consider the non-disclosure clause and 7 days to revoke it.

#### **NYC Passes Mandatory Sexual Harassment Training:**

The New York City Council recently passed the Stop Sexual Harassment Act which Mayor Bill de Blasio signed into law on May 9, 2018. The act requires all employers with 15 or more employees, including interns, to train employees on sexual harassment. The NYC law requires that employers conduct annual anti-sexual harassment training for all employees, including supervisors and managers.

Notably, although the training requirement applies to employers with fifteen or more employees, the act expands protection against sexual harassment to all employees and interns in New York City regardless of the size of the employer. This expansion is significant because the New York City Human Rights Law, ("NYCHRL") which covers employment discrimination generally, only applies to employers with four or more employees.

This expanded coverage also means all employers in New York City will be required to post NYCCHR's anti-harassment poster in a conspicuous place and provide the corresponding information to employees at the time of hire. This requirement begins **September 6, 2018**.

#### **Contents of the Sexual Harassment Training:**

Under the Stop Sexual Harassment Act, the training must:

- Provide an explanation of sexual harassment as a form of unlawful discrimination under NYC law

- State sexual harassment is unlawful discrimination under Federal and New York State law
- A description of what sexual harassment is
- The internal complaint process
- State the complaint process available through the NYC Commission on Human Rights, the New York State Division of Human Rights and the Equal Employment Opportunity Commission, including contact information
- Explain the prohibition against retaliation
- Information concerning bystander intervention (i.e. such as suggestions on how to confront a harasser)
- The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation and measures such employees should take to appropriately address sexual harassment complaints.

This training requirement begins April 1, 2019. The training must be provided annually and within 90 days of an employees' initial hire. Under this law, employers are required to keep training acknowledgement forms for three years. Starting immediately, the act also expands the statute of limitations for sexual harassment claims to three years instead of the standard one year under the NYCHRL.

The New York City Commission on Human Rights is tasked with creating an online module that will be publicly available at no charge to satisfy this training requirement. The Commission will provide completion certificates each time the training is taken. *At this time, the online program is not yet available and no date has been provided for its availability.*

**Employer Takeaways:**

For employers in New York State and New York City, it is time to review your anti-harassment policies and see if they comply with the new laws. Additionally, employers need to ensure they have a plan to train their employees. Eventually, the Division of Human Rights and New York City Commission on Human Rights will provide model policies and training online.

However, it will likely take the agencies at least months to get this system in place. Therefore, acting proactively will help employers get into compliance before they run out of time.

This legislation is a clear outgrowth of the #MeToo movement that swept the United States following the Harvey Weinstein scandal.

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