

Sexual Harassment Update

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Recap on New York's Legislation

- New York State passed sweeping legislation on sexual harassment in its 2019 budget last April
- Proposed guidance was issued in the Fall
- Final guidance was issued on October 1, 2018 requiring employers to have new policies in place by October 9, 2018
- Training requirements deferred until October 9, 2019

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Arbitration Clauses

Arbitrations: New York is **employee-friendly** in changing the legal landscape involving #MeToo claims within the context of arbitration

- New York – Restrictions involving sexual harassment claims in arbitration
 - **Banned** in Arbitration Agreements entered into after July 11, 2018
 - **Judicial Review** must be available
 - Any prohibited clause in a contract will be **null and void**
 - Does not apply to **collective bargaining agreements**
 - Expect this law to be challenged to the U.S. Supreme Court

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Non-Disclosure Agreements

- Non-Disclosure/Confidential Agreements **Banned** in Sexual Harassment Cases
 - Effective July 11, 2018
 - Use of non-disclosure agreements prohibited in any **settlement of claims** of sexual harassment, unless the complainant indicates it is his or her preference
 - Ban applies only to the disclosure of the underlying **facts and circumstances** of the claim or action; i.e., **amount** of settlement payment still can be kept confidential
 - **HOWEVER** – Municipalities are still subject to the Freedom of Information Law

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Non-Disclosure Agreements

- The complainant is allowed **21 days** to consider whether it is his or her preference to agree to confidentiality, which must be evidenced by a signed agreement at the end of the 21-day period, and then **7 days to revoke** the agreement for a non-disclosure provision
- Complainant **cannot waive** the 21-day period by evidencing agreement within a shorter time frame
- Strategy: State guidance indicates that this means parties will need 2 separate documents – one that memorializes the preference of the complainant and one that incorporates the confidentiality term as part of the overall resolution. Agreement as to confidentiality first, and **then** full agreement

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Non-Employees Can Now File Claims

- Previously, non-employees could not file claims under NY Executive Law
- Executive Law (Section 296-d) has been amended to now include non-employees
 - Contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor consultant or any other person providing services in the workplace

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Potential Non-Employees

- Vendors
- Interns
- Volunteers
- Independent contractors
- Sales representatives
- Third party building or security services
- Contractors
- Subcontractors
- Welfare to Work or HIRE workers



An employee of any of these

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New Training & Policy Requirements for 2019

- New York State:
 - All employers** in New York State now required to:
 - (1) implement a compliant anti-sexual harassment **policy** (since 10/18) and
 - (2) conduct annual interactive sexual harassment **training** pursuant to section 201-g of the New York Labor Law
 - While the proposed guidance required new employees be trained within 30 days of hire, the final guidance merely indicates that the state encourages training of new employees “as soon as possible”

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New Policy Requirements

- Policy must be in writing and must be distributed to all employees
- No requirement to obtain an employee's signed acknowledgment of receipt, but highly recommended
- Distribution by electronic means is permissible as long as the employee has access to the policy during working hours and may print a hard copy
- Policy must be in writing, given to all employees, and be in the language they speak
- Prohibit sexual harassment consistent with guidance issued by the Department of Labor
- Provide examples of prohibited conduct that would constitute sexual harassment

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New Policy Requirements, Cont'd

- Include a procedure for timely and confidential investigations which ensures due process for all involved
- Inform employees of their rights of redress and all available forums for adjudicating complaints of sexual harassment
- Clearly state that sexual harassment is employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior
- Clearly state retaliation against those who complain or those involved in any investigation or proceeding is unlawful

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New Policy Requirements

- Include information concerning the federal and state statutes concerning sexual harassment, the remedies available, and a statement that there may be applicable local laws
- Include a Complaint form
- Outline Supervisory responsibilities

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Supervisory Responsibilities

- Supervisors and managers are required to report sexual harassment to a designated person (mandatory reporters)
- Subject to discipline for failing to report or knowingly allowing it to continue
- Subject to discipline for engaging in retaliation
- Supervisors are held to a higher standard and should receive training geared toward supervisors

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What About Investigations?



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Investigations, Cont'd

- All complaints or information about suspected sexual harassment will be investigated
- Investigations should be completed in a timely manner
- Confidential to the extent possible
- Employees may be required to participate in an investigation and there can be no retaliation for participating
- Investigation will consist of the following:
 - Immediate review of the allegations
 - If an oral complaint, encourage complainant to fill out the Complaint form
 - If they decline the form, you must prepare one based on the oral information

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Investigations, Cont'd

- Request, gather and preserve documents relevant to the allegations
 - Interview parties and witnesses
 - Document the investigation, including creating a list of the documents reviewed and their contents, list of witnesses and a summary of their statements, a timeline of the events, a summary of prior relevant incidents, and final resolution with corrective actions
-
- Promptly notify the parties of the result and final determination
 - Inform Complainant of right to pursue "external remedies"

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Retaliation

- Any action that would keep a worker from coming forward to make a complaint or support a sexual harassment claim
- New York State Human Rights Law protects any individual who has engaged in "protected activity"
- Protected activity occurs when a person has:
 - (i) Filed a complaint
 - (ii) Testified or assisted in a proceeding involving sexual harassment
 - (iii) Opposed sexual harassment
 - (iv) Complained on behalf of another employee
 - (v) Encouraged a fellow employee to report harassment

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Model Sexual Harassment Policy

- The Department of Labor in consultation with the Division of Human Rights developed a model policy and training program
- The model policy may be found here:
https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf
- The minimum standard for a policy may be found here:
<https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionPolicies.pdf>

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Model Complaint Form Must be Used with Policy

- A model complaint form is available here:
<https://www.ny.gov/sites/ny.gov/files/atoms/files/ComplaintformSexualHarassment.pdf>

Complaint Form For Reporting Sexual Harassment Consulting Sexual Harassment

[Name of employee]

New York State Labor Law requires all employers to adopt a model harassment prevention policy that includes a complaint form for employees to report incidents of sexual harassment.

If your employer tells you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to your employer or the appropriate contact information for assistance or advice. You may also file a complaint with the Division of Human Rights. Check your employer's model policy to ensure that you are following the correct procedure for reporting and investigating incidents.

If you are not immediately reported verbally or in another manner, your employer is not required to follow to correct the situation or provide any other assistance or support as outlined in the text of this form.

For additional resources, visit ny.gov/submitting-complaints.

COMPLAINANT INFORMATION

Name: _____ Work Address: _____
 Home Address: _____ Work Phone: _____
 Home Phone: _____ Email: _____
 Job Title: _____
 Select Preferred Communication Method: _____ (please select one)

SUPERVISORY INFORMATION

Immediate Supervisor's Name: _____
 Title: _____
 Work Phone: _____ Work Address: _____

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is filed against:

Name: _____ Title: _____
 Work Address: _____ Work Phone: _____

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Model Complaint Form



- **HOWEVER**, guidance and sample policies and training make clear that verbal complaints **MUST** be investigated
- Accordingly, complaints from individuals who are unwilling to fill out a written complaint **MUST** be investigated

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New Training Requirements for All Employers

- Annual “interactive” training on sexual harassment must be provided to all employees (Labor Law Section 201-g)



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Mandatory Training

- All employers are required to provide employees with sexual harassment prevention training
- Employers can choose to use the model training created by the State Department of Labor and Division of Human Rights
- Employers have the option to create their own training that meets or exceeds the minimum standards
- Employers need to provide the training in the language spoken by their employees

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Minimum Standards for Sexual Harassment Prevention Training

For those employers that do not use the model training, the training that they use must meet or exceed the following minimum standards

Minimum Standard Checklist:

- Training must be interactive
- It must include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
- Must include examples of conduct that would constitute unlawful sexual harassment
- Must include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
- Must include information concerning employees' rights of redress and all available forums for adjudicating complaints
- Must include information addressing conduct by supervisors and any additional responsibilities for such supervisors

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What is Interactive?

- “Interactive” Training = Some form of employee participation
- Training can be completed online
 - Note: An individual merely watching a training video or reading a document only, with no feedback mechanism or interaction, would not be considered interactive
- Examples of Acceptable Employee Participation:
 - If the training is web-based, it has questions at the end of a section and the employee must select the right answer
 - If the training is web-based, the employees have an option to submit a question online and receive an answer immediately or in a timely manner
 - In an in-person or live training, the presenter asks the employees questions or gives them time throughout the presentation to ask questions
 - Web-based or in-person trainings that provide a Feedback Survey for employees to turn in after they have completed the training

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Live Trainers or Third Party Vendors

- Live trainers can appear by in person, phone, or video conference
 - No certification is required
 - Currently, NYS does not certify or license trainers
- Third Party Vendors
 - Employers can use third party vendors to deliver or provide the training
 - Employers are responsible to ensure that materials meet the minimum standards
- Review by Legal Counsel of policies and training is recommended

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Training Deadlines and Frequency



- All employees need to complete training by October 9, 2019
- New hires “should be trained as quickly as possible”
- Training must be done annually
 - Employer has discretion to set this annual date
 - Examples: can be based on calendar year, employees anniversary.
- No requirement on the length of the training
 - Must meet the minimum standards

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Who Has to be Trained?

- “ALL” means every single employee, regardless of immigration status
- Covered persons for training requirement includes:
 - Part-time employees
 - Temporary employees
 - Seasonal employees
 - Exempt or non-exempt employees
 - Minor employees
 - HIRE or Welfare to Work Workers
 - NOTE: Only those employees who work in NYS must be trained

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State Website Resources

- State's Model training includes:
 - A script for trainers
 - Examples or case study scenarios
 - A power point presentation
 - Two videos that can be used for training (on YouTube 41 min. total)
 - FAQ's to accompany the model training
 - A tool kit for employers
- Other State Resources: Posters, Overview of the Law video

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A Word of Caution . . .

- Key Points:
 - The Model training should be modified to meet the needs of the individual organization
 - The Model training should be amended to include "industry specific scenarios"
 - The training should be given to every level of staff and at every office or location
 - Training needs to include any internal process for employees to file a complaint, including the specific individual(s), their contact information, and office(s) that employees alleging harassment should file their complaints



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Different Training for Supervisors?

- Employers can provide separate training sessions for employees and supervisors or managers
- Employers must make all employees aware of the extra requirements for people in supervisory or managerial roles
- Other supervisory responsibilities (FMLA, ADA, etc.)

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Model Training for Supervisors

- Supervisors held to a higher standard of behavior
- Supervisors need to model appropriate behavior and conduct at work
- These individuals hold a position of authority and must not abuse that position
- Actions of supervisor can create liability for employer without the employer having any opportunity to correct the harassment
- Responsible for any harassment or discrimination that they should know about with "reasonable care and attention to the workplace for which they are reasonable"

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Supervisor Training Needs To Acknowledge New Role As Mandated Reporters

- Supervisors are now mandated reporters
- Supervisors cannot tell an employee to "just ignore it"
- Model training language on supervisor's responsibility"
 - "Supervisors must report any harassment that they observe or know of, even if no one is objecting to the harassment"
 - "If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the employer, without exception,
 - Even if the supervisor or manager thinks the conduct is trivial
 - Even if the harassed individual asks that it not be reported..."

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Are you Required to Pay Employees for Training?

- Employers are expected to follow federal regulations that require employer-provided training time is counted as regular work hours



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Settlements – Public Employers

- New York Public Officers Law §18 amended to add a new section 18-a, which provides for reimbursement by an employee who is adjudicated to have committed harassment to the public entity that has paid any award

This was effective for all settlements entered into since July 2018.

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Settlements, Cont'd

- Employee is broadly defined to include appointed employees, elected officials and anyone holding any appointment in public service whether paid or unpaid, including former employees or individuals in these categories
- Any employee who has been the subject of a final judgment of personal liability for intentional wrongdoing "related to a claim of sexual harassment" shall reimburse the public entity for any award paid within 90 days of the payment of the award

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Settlements – Public Employees

- If the employee does not pay, the municipality can garnish wages
- There is a similar amendment to Public Officers Law 17-a which applies to New York State employees

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State Contractors

- All bidders on state competitive bidding contracts must submit a certification with every bid certifying under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees in compliance with Department of Labor regulations (to be enacted). Finance Law § 139-1
- Any bid not meeting this requirement will not be considered
- **Effective January 1, 2019**

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State Contractors

- For contracts not subject to competitive bidding, it is in the discretion of the state agency or department to require the certification
- Provides for bids made to “the state or any public department or agency thereof”

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What to Do Now?

- If you haven't done so, update sexual harassment and other harassment and discrimination policies
- Make sure any employee handbook or posting is updated to contain the new policy
- Post the harassment and discrimination policy prominently in the workplace and in areas where non-employees are likely to be present
- Consider distributing the harassment and discrimination policy to all non-employees and their contractors and employees
- Begin to develop and provide training

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What to Do Now?

- Consider providing a copy of your County's harassment and discrimination policy and complaint form with your bid documents and contracts and include requirements that the contractor review the County's policies and procedures, disseminate the policy and procedures to its employees, vendors and contractors that will be working on the County project and certify that its company is also in compliance with New York State Harassment and Discrimination requirements
- Review defense and indemnification provisions in your contract to ensure they cover defense and indemnity from actions involving harassment and discrimination

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Deadlines for Compliance

- July 11, 2018:
 - New employment agreements must be in compliance with respect to mandatory arbitration and non-disclosure provisions relating to sexual harassment claims
- October 9, 2018:
 - All employers must have in place sexual harassment prevention policies in compliance with NYS law
- October 9, 2019:
 - Mandatory interactive training or a comparable training that meets the minimum standard for all employees must be completed

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New York State Website

- The New York State model policy, complaint form and training requirements can be found at the following website:
 - ny.gov/programs/combating-sexual-harassment-workplace



Services News



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Stop Sexual Harassment in NYC Act



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<https://goo.gl/images/MbW0G8>



New York City Stop Sexual Harassment Act

- NYC: "Stop Sexual Harassment in New York City Act"
 - Changes the **definition of "employer"** in the context of gender-based harassment to include all employers, even those with less than four employees
 - Extends the statute of limitations for filing complaints with the NYC Commission on Human Rights of "claim[s] of gender-based harassment" under the NYCHRL from one year to **three years** after the alleged harassing conduct occurred
 - All employers are required to display an anti-sexual harassment rights and responsibilities **poster** which was recently released by the Commission

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New York City- New Training Requirements for 2019

- New York City:
 - Employers with **15 or more** employees must provide **interactive** training **annually** beginning April 1, 2019
 - "Employees": **full or part time** employees and **interns** count
 - "Interactive": not necessarily live sexual harassment prevention training; The NYC Commission on Human Rights will develop an **online interactive training module** that may be used by an employer
 - New employees must be trained within **90 days of hire**
 - Employers must keep a record of all trainings for at least **three years**
 - Records must be available for the NYC Commission on Human Rights to inspect upon request

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2020 State Budget

- Any expected changes to the requirements for Harassment and Discrimination??

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Questions?



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