

LABOR AND EMPLOYMENT

NEW YORK PROVIDES FINAL SEXUAL HARASSMENT PREVENTION GUIDANCE AND MODEL POLICY AND TRAINING MATERIALS

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On October 1, 2018, New York State released its final guidance on the State's sexual harassment prevention laws which were enacted on April 12, 2018 when Governor Andrew Cuomo signed the New York State Budget. On August 23, 2018, the State issued draft guidance which was open for public comment through September 12, 2018. The final materials, available online at <https://www.ny.gov/programs/combating-sexual-harassment-workplace>, address issues raised in the comments and include: a model sexual harassment prevention policy; a model sexual harassment complaint form; model training documents; minimum standards for sexual harassment prevention policies and training; updated FAQs; toolkits for employers and employees; and an optional sexual harassment prevention policy poster.

Highlights of the final materials include:

Policy Provisions

- By October 9, 2018, all New York State employers (regardless of size) must either adopt the State's model Sexual Harassment Policy or implement a policy that meets or exceeds the State's minimum standards. The policy can be provided to individuals in writing or electronically and, if provided electronically, individuals must be able to print a copy.
- The policy should be provided to new employees upon hiring and "before commencing work." The State also recommends posting the policy "prominently in all work locations to the extent practicable."
- The policy must be provided in the language spoken by employees. Finalized materials will be translated into Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish, and Haitian-Creole and available on the State's website. Until translated templates are available from the State, employers may provide employees an English-language version.
- The policy must define sexual harassment and provide examples.
- The policy must clearly state that sexual harassment is a form of employment misconduct and that sanctions will be taken against individuals engaging in sexual harassment.
- The policy must also prohibit retaliating against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment.
- The State's model policy provides detailed investigation procedures. Employers do not have to adopt the State's investigation procedures, but the employer's investigation procedures should be described in its policy and include a procedure for timely and confidential (to the extent feasible) investigation of complaints. Notably, the State's previous suggestion that complaint investigations be completed within thirty days has been replaced with "as soon as possible."

- Employers must have a complaint reporting form. If the complaint form is not attached to the policy, individuals should be informed where to obtain the form (for example, on the employer's intranet site, from Human Resources, etc.).
- The policy should advise managers and supervisors of their duty to report any (i) complaints they receive or (ii) harassment they observe. The policy should further warn managers and supervisors that they will be subject to corrective action if they fail to make any such reports or knowingly allow harassing behavior to continue.
- The policy should provide information on federal, state, local, and court avenues to report and adjudicate claims, including contact information for local police agencies.

Training Requirements

- Training for all employees must be completed by October 9, 2019 and new employees should complete training "as soon as possible." This is a significant change from the State's August 23, 2018 draft guidance which originally required training be completed by January 1, 2019 and new employee training completed within thirty days of hire.
- Employers may adopt the State's model Sexual Harassment Prevention Training or conduct training that meets or exceeds the State's minimum standards.
- The State will also be offering training via workshops and webinars.
- Employers should provide employees with training in the language spoken by their employees and, like the State's model Sexual Harassment Policy, the State will translate its training materials into various languages.
- Training must be provided to all employees who work, or will work, in New York, including non-exempt employees, part-time workers, seasonal workers, and temporary workers. An employee based in another state must be trained if the employee works "a portion of their time in New York State." However, the final guidance does not define what constitutes "a portion" of an individual's time.
- Employees must be trained annually. This may be based on the calendar year, the anniversary of each employee's start date, or any other date the employer chooses.
- If employees have already received training this year, but it did not meet all new requirements, employers need only provide supplemental training to ensure all requirements are met.
- Training must be "interactive" and may be online. Examples of interactive web-based training include:
 - Having questions at the end of a section where the employee must select the right answer.
 - Allowing employees to submit question(s) online and receive an answer in a timely manner.
- An interactive in-person or live training should include a presenter asking employees questions or giving them an opportunity to ask questions.
- All training should include a feedback survey.
- The State specifically states that merely watching a video or reading a document will not be considered interactive.

- The training must include an explanation of sexual harassment and provide examples of conduct that would be considered unlawful sexual harassment.
- The training must notify supervisors and managers of their duty to report any harassment that they observe or otherwise know of, even if no one is objecting to the behavior. The training should also advise supervisors and managers that they will be subject to disciplinary action for failing to report suspected sexual harassment or allow sexual harassment to continue.
- As with the policy, the training should provide information on federal, state, local, and court avenues to report and adjudicate claims, including contact information for local police agencies.
- The State also provided several case studies to be used in conjunction with the State's model training that include True/False questions and explanations.

Non-Employees

- Harassment of non-employees is prohibited. "Non-employees" include: contractors, subcontractors, vendors, consultants, customers, clients, independent contractors, temporary workers, paid or unpaid interns, or anyone else providing services in the workplace.
- Employers are not required to provide a copy of the policy or to train non-employees, but the State encourages employers to do so as employers may be liable for harassment committed by or against non-employees.
- Posting the State's optional Sexual Harassment Prevention Poster and the employer's policy in a central location are other ways of informing non-employees of their rights and the process for filing complaints.

Recordkeeping

- The State does not currently require signed acknowledgements from employees indicating that they have received the policy, and the State does not require attendance records for training purposes. However, we recommend employers obtain an acknowledgement from employees (either in writing or electronically) that they have received the policy, and employers should track training attendance. Such records may be helpful in responding to complaints or defending any legal claims.

Prohibition Against Mandatory Arbitration of Sexual Harassment Claims

- The New York Civil Practice Law and Rules was amended effective July 11, 2018 to prohibit mandatory arbitration of sexual harassment claims.
- The prohibited clause is null and void, but the remaining provisions in an arbitration agreement remain enforceable.
- If a collective bargaining agreement requires mandatory arbitration of sexual harassment claims, the terms of the collective bargaining agreement prevail.
- However, it is unclear whether this arbitration prohibition will ultimately be enforceable as the United States Supreme Court has routinely held that state laws that expressly identify a category of claims that cannot be arbitrated (in this case, sexual harassment claims) are preempted by the Federal Arbitration Act (FAA).

- We recommend that employers consult with their legal counsel to determine whether their arbitration agreements should be modified, and continue to monitor the legal developments regarding enforcement of this provision in light of the Supreme Court's interpretation of the FAA.

Non-Disclosure Clauses in Settlement Agreements

- Confidentiality/non-disclosure clauses related to any settlement, agreement, or other resolution of a sexual harassment claim are prohibited unless it is the complainant's preference.
- The State's final guidance describes the following three-step process to confirm that it is the complainant's preference to include the confidentiality/non-disclosure clause. The process requires execution of two separate documents.
 - The confidentiality/non-disclosure term or condition must be provided to all parties, and the person who complained has 21 days from the date such term or condition is provided to consider such term or condition.
 - If after 21 days, such term of condition is the preference of the person who complained, such preference shall be memorialized in an agreement signed by all parties.
 - For a period of 7 days following the execution of a separate agreement containing such a term, the person who complained may revoke the agreement and the agreement shall not become effective or be enforceable until such revocation period has expired.
- The 21-day consideration period cannot be waived or shortened.
- The State specifically rejected recommendations that the process required by the Older Workers Benefit Protection Act for waivers of age discrimination claims be used to memorialize a complainant's agreement to the confidentiality/non-disclosure clause.

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