Legal Update Article

New York State Issues Final Guidance Regarding Combating Sexual Harassment in the Workplace

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The State of New York has issued final guidance on combating sexual harassment in the workplace. This includes updated guidance on the mandatory sexual harassment prevention policies and annual employee training applicable to employers in New York beginning October 9, 2018.

The updated final guidance and other resources, including a model policy, model training materials, and a Toolkit For Employers, are available on the state's dedicated website. The final guidance also includes FAQs addressing the policy and training requirements, as well as on nondisclosure agreements and mandatory arbitration provisions.

The final guidance provides clarity for employers in the areas discussed below and significantly delays the deadline for training of current employees.

Updated Model Training Program Guidance

In addition to updates to the model sexual harassment training program and accompanying PowerPoint presentations, the FAQs extend to *October 9, 2019,* the deadline to train all employees.

The state also removed language requiring employers to train new hires within 30 days of hire, replaced it with "as soon as possible." In the Training section:

> *Q3. How soon do new employees need to be trained?*
>
> A3. As employers may be liable for the actions of employees immediately upon hire, the State encourages training as soon as possible. Employers should distribute the policy to employees prior to commencing work and should have it posted.

The FAQs also provide guidance on obligations to provide training in other languages for employees whose primary language is other than English. In the Languages section:

> *Q1. Will New York State make resources available for training in languages other than English?*
>
> A1. Yes. Finalized materials will be translated into Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish and Haitian-Creole as quickly as possible and available on this website. Additional languages may be added in the future.
>
> *Q2. Am I required to provide the policy and training in languages other than English?*

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A2. Yes. Employers should provide employees with training in the language spoken by their employees. Model materials will be translated in accordance with Executive Order 26, Statewide Language Access Policy. When a template training is not available from the State in an employee's primary language, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a policy and training in the language spoken by the employee.

Updated Model Sexual Harassment Policy

In addition to the training requirements, employers in New York must implement the state's model sexual harassment policy, modify an existing sexual harassment policy to meet the state's minimum standards, or adopt a policy to meet the state's minimum standards.

The state has made certain stylistic and substantive changes throughout the final model policy. Significantly, the 30-day period to complete sexual harassment investigations has been replaced with "as soon as possible" and "commenced immediately."

The previous draft policy stated that the policy must be posted prominently in all work locations. The final version states the policy "should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location)." These revisions are more consistent with the law and other guidance issued as there are is no per se requirement to post the policy based on the law or the minimum standards or FAQs issued by the state.

The previous draft policy also included introductory language in the section on external remedies and legal protections that implied that employees could pursue a matter with an administrative agency such as the Equal Employment Opportunity Commission or State Division of Human Rights "at any time." This was inconsistent with substantive language in the policy's detailed information on such external legal remedies and with applicable law. The final policy no longer has such introductory language.

Other revisions made to the final model policy include adding language regarding unlawful "sex stereotyping."

As noted, employers are not required to use the state's model sexual harassment policy, but must adopt a policy by October 9, 2018, that meets or exceeds the state's minimum standards.

Updated Model Sexual Harassment Complaint Form

Pursuant to the law and minimum standards related to sexual harassment policies, an employer's sexual harassment prevention policy must include a complaint form that employees can use to submit claims in writing. The draft model complaint form included questions on whether the complainant filed a lawsuit or is represented by counsel. The final model complaint form does not contain those questions. Instead, it contains the following statement: "If you have retained legal counsel and would like us to work with them, please provide their contact information."

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Further, the updated FAQs clarifies the complaint process. For example, FAQ #6 of the Policy section states the complaint form can be made available on a company's internal website.

> *Q6. Does the complaint form need to be included, in full, in the policy?*
>
> A6. No. Employers should, however, be clear about where the form may be found, for example, on a company's internal website.

Nondisclosure Agreements

The updated FAQs also provide additional guidance on nondisclosure agreements related to sexual harassment. On the process that must followed to effectuate nondisclosure agreements related to sexual harassment claims and related settlements, the FAQs explain (i) the employer's ability to initiate the process and (ii) the requirement of a standalone agreement regarding such nondisclosure separate and distinct from any broader settlement agreement and irrespective of whether the broader agreement provides a 21-day consideration period and 7-day revocation period for those age 40 and over for which waiver of an age claim under federal law is included in the agreement. In the Nondisclosure Agreements section:

> *Q6. Can the employer initiate the process by suggesting a term or condition of confidentiality?*
>
> A6. As long as the statutory process and timeline summarized above is followed, the law does not prohibit the employer from initiating that process.
>
> *Q7. Does the process established under the law mean that the parties will need to enter into two separate documents providing for nondisclosure: 1) an agreement that memorializes the preference of the person who complained, and 2) whatever documents incorporate that preferred term or condition as part of a larger overall resolution between the parties?*
>
> A7. Yes, as summarized above, starting July 11, 2018, employers will lose the ability to include or agree to include such nondisclosure language in documents resolving sexual harassment matters unless the complainant's preference for that language has been memorialized in an agreement signed by all parties after following the three-step procedure ....
>
> *Q9. Are the new law's provisions for memorializing a plaintiff's preference for confidentiality intended to track federal provisions for waving age discrimination rights?*
>
> A9. While both the new law and federal age discrimination laws reference 21-day consideration periods and 7-day revocation periods, the context, language and purposes of the state and federal provisions are not the same. Specifically, while the practice of some under the federal law is to fold waivers into standard representations and warranties provisions of settlement agreements that can be presented and executed on the spot, in a single agreement, without waiting for the 21-day consideration period to expire, the new state law requires a separate agreement to be executed after the expiration of the 21-day consideration period before the employer is authorized to include confidentiality language in a proposed resolution.

Accordingly, the law requires "a separate agreement to be executed after the expiration of the 21-day consideration period before the employer is authorized to include confidentiality language in a proposed resolution."

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For more information on the New York statewide anti-sexual harassment requirements, see our articles:

- New York State Issues Draft Guidance on Required Sexual Harassment Prevention Policies and Training
- New York Legislature Passes Significant Changes to Laws Combating Sexual Harassment in the Workplace

For information regarding New York City's recent sexual harassment legislation, which may require modification of training materials for New York City employees when it becomes effective on April 1, 2019, please see our articles:

- Reminder: New York City Employers Must Distribute Fact Sheet, Post Notice on Sexual Harassment Law by Sept. 6
- New York City Commission on Human Rights Issues Mandatory Sexual Harassment Notice and Fact Sheet
- New York City Enacts Anti-Sexual Harassment Legislation that Includes Training Requirement
- New York City Council Passes Legislative Package Aimed at Preventing Sexual Harassment in the Workplace
- New York City Legislation Would Mandate Sexual Harassment Training, Expand Employer Coverage under Human Rights Law

Please contact a Jackson Lewis attorney with any questions related to harassment policies, training, and other preventive practices.