

BUFFALO Law Journal

VOL. 91 _ NO. 2 _ JANUARY 14, 2019 _ EST. 1929

\$2.00

Navigating the new laws

BY PATRICK CONNELLY
pconnelly@bizjournals.com
(716) 541-1654, @LawJournalEd

September was a nerve-racking month for employers in New York. It was even more stressful for human resource professionals and attorneys in employment law.

The state, as announced by Gov. Andrew Cuomo earlier in 2018, had taken a hardened approach to combating sexual harassment in the workplace.

New regulations would become law soon, but the first draft released online for review had some tough asks of employers. The state wanted all employers, regardless of size, to have a sexual harassment policy in place by Oct. 9 and to conduct interactive training for current employees by year-end and new employees within 30 days of their start date.

see **HARASSMENT**, PAGE 1



Elizabeth McPhail is an employment law attorney at Hodgson Russ LLP. After three months of new laws, employers, attorneys and workplace trainers are coming to grips with the reality of combating sexual harassment.

"There was a lot of anxiety before those final rules were issued as to whether or not everyone was going to have to be trained by Jan. 1," said Elizabeth McPhail, partner at Hodgson Russ LLP.

The state instead made October 2019 the deadline.

"With that little bit of a breather, I think employers are feeling more relaxed about having to figure out which of these models is the way to go for them in terms of training," McPhail said.

Labor and employment attorney Vincent Miranda, a partner at Lippes Mathias Wexler Friedman LLP, agreed. So did HR consultants Tammy Campbell and Julie Williams of Paychex Inc. The women conduct training sessions on behalf of businesses that hired Paychex as a third-party facilitator.

"Some of the employers kind of panicked a bit," Campbell said. "We were working behind the scenes to make sure that as soon as they released it ... we were ready to go with the solutions."

"I think when (a preliminary draft of the new rules) came out, employers started scrambling," Miranda said. "What we initially saw when the final guidance came out was (employers saying), 'Let's put the training to the side for the moment ... and focus on the policy.'"

Despite the state's best intentions to counteract sexual harassment, the consensus among those who practice that type of law was it was nearly impossible to have training completed statewide by Dec. 31.

"Training how many millions of employees in the state of New York by the end of 2018? It was just a very unrealistic time frame," Williams said.

Now, three months into having the changes become standard practice, some employers have begun to settle in.

But others, particularly small businesses, still have questions.

What changed?

Under the new laws, it's mandatory that

workplaces statewide have annual sexual harassment prevention training and a policy agreed to by employees.

Training must contain examples of harassment, outline New York statutes and explain the steps to report an incident through management or the state's website.

Vendors or temporary workers spending any amount of time in a workplace must be trained, as well.

"They have to adopt and deliver a policy to the employees about anti-harassment and they have to receive the training, which should be considered interactive," Campbell said.

Before the final policy was released, the state hadn't detailed what interactive training entailed. New York wants employers to have training that "captures your workforce's attention and engages them in a different way around the topic," Miranda said.

That portion of the law is satisfied by "allowing the employees to ask questions and get a response to their answers in a timely fashion," Campbell said. "It doesn't necessarily mean in-person (training), but we can offer it in person (or) we can do it online to make it easier."

"I don't think there's a better or worse (way to do it)," McPhail said. "I think probably still the gold standard is having some kind of an in-person trainer in order to meet that interactive component. ... I think it's more about making sure that the training that you select itself is well-tailored for the workforce that you have."

Training

Paychex already had a sexual harassment prevention presentation for companies before the new laws took effect, the trainers said.

"In the past, we had two different sessions that we would do - one specifically geared toward employees only and a separate session for the supervisors and managers," Williams said. "With this new regu-

lation, it's nice because it's streamlined and completely transparent, so the same information is being delivered to both parties and now everybody's on the same playing field. There isn't any way anybody could hide anything or ensure that people don't know how to make any sort of claims."

The new training package Paychex uses revises the state model to make it "a bit more deliverable" to employees, she said.

She and Campbell, in their presenta-



Tammy Campbell, left, and Julie Williams of Paychex Inc. run sexual harassment training sessions for local companies. Once the new regulations took effect in New York, they updated their presentations to reflect the state's new interactive mandate.

tions, run through what they prepared and use a slideshow for visuals. Once completed, they open up the floor to questions.

"They (are now) asking more open-ended questions than we have usually had in the past," said Williams. "Usually people just stare at us very blankly. Now we find that they're more engaged because this training really goes into explaining definitions of what sexual harassment is, what sex discrimination is (and) what sex ste-

reotyping is like.

"This regulation really went into great detail to make people understand all that is included. It's not just sexual harassment; there's so much more involved. Now they're more aware so going forward they know what to do."

The presentations also prepare employers for what to expect, Campbell said.

"They can be confident to say, 'We're doing all of our due diligence. We're taking every proactive step possible to make sure that doesn't happen here. And if it does, we're ready to address it,'" she said.

"If they have a policy in place," Williams said, "if it's communicated to their employees and somebody does make a complaint and it goes through litigation or (Equal Employment Opportunity Commission) or New York State Department of Human Rights, when they conduct their investigation, they'll find out that the employer did do their due diligence."

Employees absent the day of a Paychex presentation can view a web version that satisfies the law's requirement, the trainers said.

Companies see training evolve

With everything in place, employers are moving past the learning curve.

"I think we certainly had some bumps in the road as the final guidance on how the policy was issued," McPhail said.

She and fellow attorneys have helped employers such as school districts, municipalities and unions overcome "minor hiccups" in implementing policies, she said.

Smaller employers without HR personnel have experienced the most difficulty, McPhail said. Some weren't sure if they even needed policies.

"The answer is yes," she said. "Drafting that policy had some unique challenges (for those businesses) because there's no human resources department to make a complaint to. How do you draft a policy that gives an adequate complaint procedure to an employee in that type of a circumstance or in circumstances for smaller, family-owned types of businesses that don't necessarily have an HR department? What's the complaint procedure? Those were some of the unique questions that we addressed."

"At this point, we're really over all of those hiccups and everyone pretty much has a policy implemented," she said.

In terms of training, McPhail encourages employers to keep records and to do what's best for them financially and their workforce.

Miranda so far has seen most employers use the state's model policy, he said. He also found web-based training programs are easier to administer on a recurring basis and when new employees come onboard.

Training could evolve as time goes, McPhail said.

"What the training looks like over time may be impacted by whether the implementation of the policy changes the workforce in any way," she said. "If they're starting to get a lot more internal complaints and things like that ... that may impact how they'll do the training."

Campbell and Williams said the state will likely look for ways to ensure that employers follow protocol.

"I think they're pumping a lot more money into the Division of Human Rights (and) making sure they have the ability to handle the amount of claims they're going to see come in," Campbell said. "I wouldn't expect any fines or things like that the first year, but as this progresses and develops, I think there will be more time, more money and more focus (on this)."

"Might they get more stringent on the new-hire requirements? Might they take those extra steps? Absolutely," she said. "I don't see the state backing down or stopping in any way."