

NYS ISSUES A DRAFT MODEL TRAINING PROGRAM AND GUIDANCE RELATED TO WORKPLACE SEXUAL HARASSMENT

Labor & Employment Alert
August 29, 2018

As we previously reported, this year's budget bill imposed on New York employers a number of new requirements related to preventing sexual harassment in the workplace. Of particular importance was the requirement that all New York employers (public and private) implement a policy prohibiting sexual harassment and conduct annual employee training on sexual harassment. This week, the New York Department of Labor and the Division of Human Rights released a **draft** sexual harassment prevention policy and training documents that, when finalized, may be used by covered employers to satisfy the budget bill's requirements. In addition, Governor Cuomo launched a website, "Combating Sexual Harassment in the Workplace," which contains FAQs on the draft sexual harassment policy and training and other components of the budget bill, including restrictions on confidentiality clauses in agreements settling claims of sexual harassment. This alert summarizes the key aspects of the draft model policy, training program, and guidance issued by the State.

Draft Model Sexual Harassment Prevention Policy

The draft model sexual harassment prevention policy contains the minimum requirements for sexual harassment policies. Employers whose existing sexual harassment policies do not meet these standards will have to revise their policies. Not surprisingly, the draft model policy would require that any policy prohibiting sexual harassment defines sexual harassment, provides examples of sexual harassment, provides information to employees regarding their right to seek recourse – and where to seek recourse – from sexual harassment, and employers' responsibilities to identify and investigate harassment. In addition to the draft model policy, the State released guidance which:

- States that the policy would apply to all employees, applicants, interns, contractors and persons conducting business with the employer. This is a significant expansion of the current law prohibiting sexual harassment, whose application has been confined to employees and interns.
- Provides managers and supervisors must report any complaint that they receive or any harassment that they observe. While this has always been the best practice in

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meeting employers' obligations under existing federal and State laws prohibiting sexual harassment, this interpretation would impose a greater obligation on employers to ensure that their supervisors are trained and equipped to identify and properly report harassment.

- States that an investigation of any complaint “should” be completed within 30 days. This particular requirement may have been a best practice in the past but, if the model guidance is adopted by the State, State investigators who may investigate complaints of sexual harassment will expect that employers will have adhered to this timeline.
- Identifies the various avenues and remedies available to employees through the EEOC, New York State Division of Human Rights, New York City Commission on Human Rights (where applicable), and the local police department for workplace harassment.
- Outlines the steps for conducting investigations of sexual harassment, including: (i) conducting an “immediate: review of the allegations; (ii) encouraging the complaining employee to complete a written complaint form or, if s/he refuses, preparing a complaint form based on the oral reporting; (iii) taking steps to preserve relevant documents, emails or phone records; (iv) creating written documentation of the investigation that includes certain key information; and (v) informing the complainant of his or her right to file an external complaint or charge. These investigation requirements are higher than most employers currently use and, if adopted, will require human resources professionals and managers to receive training on conducting workplace investigations.
- Must be posted prominently in all work locations and be provided to employees upon hiring.

The State has also released a draft model complaint form that employers may use to document employee complaints of harassment.

Draft Model Sexual Harassment Training Program

The draft model sexual harassment training program largely addresses the requirements of the draft model sexual harassment policy (e.g., notifying employees of their right to file a complaint with the EEOC). While the State only released a model training program for in-person training, the State has indicated that it will make available a PowerPoint and video presentations.

Importantly, the FAQs issued in conjunction with the model sexual harassment training program state that “all employees must complete the model training or a comparable training that meets the minimum standards by January 1, 2019.” The budget bill, however, does not establish this deadline for employers to complete the sexual harassment training. If ultimately adopted, employers – especially large employers – will have a little more than three months to provide the training to all of their employees.

The FAQs also state that “all new employees should complete sexual harassment prevention training within 30 calendar days of their start date.” The budget bill, however, does not specifically address how quickly new employers must be trained. For existing employees, the guidance documents provide that “all employees must complete an additional training at least once per year,” and that the annual training “may be based on calendar year, anniversary of each employee’s start date or any other date the employer chooses.”

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According to the draft guidance, all employees, including temporary and transient employees, must receive training, even “if someone just works for one day for the employer, or . . . works for just one day in NY.”

As stated in the budget bill, the anti-sexual harassment training must be interactive. The State’s guidance provides that some form of employee participation will be required in order to be considered interactive. The training may: (i) be web-based with questions asked of employees as part of the program; (ii) include a live trainer made available during any pre-recorded or web-based session to answer questions; (iii) require feedback from employees about the training and materials presented; and (iv) address when new employees that have received training from a prior employer within the past year can be deemed by the new employer to have satisfied the law’s training requirements.

Draft FAQs on Nondisclosure Provisions

The State also released FAQs addressing the prohibition on the use of non-disclosure clauses in settlements or agreements relating to claims of sexual harassment. As we previously reported, the State budget bill provided that agreements entered into for purposes of settling claims of sexual harassment cannot contain a nondisclosure provision unless the condition of confidentiality is the preference of the complaining employee. The draft guidance states that any non-disclosure term or condition must be provided to all parties, and the complainant must have 21 days from the date provided to consider such term or condition. If, after 21 days, the complainant “prefers” to have confidentiality provision in their agreement, such preference shall be memorialized in an agreement signed by all parties. For a period of 7 days following the execution of an agreement containing such a term or condition, the complainant may revoke the agreement, and the agreement will not become effective or be enforceable until the revocation period expires. The FAQs state that two agreements would be required to establish a complainant’s agreement not to disclose facts underlying a claim of harassment—one agreement memorializing the complainant’s preference to maintain the allegations as confidential, and a second agreement containing the nondisclosure language and any other terms of the parties’ agreement resolving the dispute. This is in contrast to the current practice of stating, in a single agreement, that the complainant agrees not to disclose the nature of the allegations leading to the settlement or the existence of the settlement.

The Takeaway

The draft model documents and the State’s FAQs are in draft form, and comments on these documents and guidance will be open to the public until September 12, 2018. As outlined above, the State’s guidance and interpretation of the budget bill, in several cases, go beyond the budget bill’s requirements and could be detrimental to employers’ operations. Employers are encouraged to submit their comments, and any concerns, to the State for consideration as these model documents and guidance is finalized. Given Governor Cuomo’s agenda to combat sexual harassment, however, the final guidance and model policy and training module are expected to be largely identical to what has been proposed. Thus, employers are advised to begin preparing for implementation of these requirements, as currently proposed.

Employers entering into settlement agreements should contact a Hodgson Russ employment attorney to review the settlement agreement in view of the budget bill’s new requirements regarding confidentiality provisions contained in such agreements. Templates that employers may have on file will no longer satisfy the legal requirements in cases settling sexual harassment claims.

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In view of the tight deadlines to train all employees on sexual harassment, employers should begin to schedule in-service and meetings for providing these trainings. Counsel should be consulted to ensure that the training provided satisfies the legal requirements and that employers are maintaining adequate proof of training.

Lastly, in view of the proposed requirements for identifying and addressing complaints of sexual harassment, including specific investigation requirements, managers, and human resources professionals should be trained by counsel on these requirements and procedures.

Please do not hesitate to contact any one of our Labor and Employment attorneys if you have questions regarding any matter discussed in this alert.