

New York State Issues Draft Guidance on Required Sexual Harassment Prevention Policies and Training

The State of New York has issued draft guidance for employers on the mandatory sexual harassment prevention policies and annual employee training required by legislation passed earlier this year. Starting October 9, 2018, the enacted legislative package requires, among other things, that employers in New York adopt the state's model sexual harassment prevention policy or modify an existing sexual harassment policy to meet the state's minimum standards, and provide annual sexual harassment prevention training to all employees.

Draft Guidance

The state's newly created dedicated website contains a model sexual harassment prevention policy, an accompanying model complaint form, a "Combating Sexual Harassment: Frequently Asked Questions" publication, and model sexual harassment prevention training materials. Additionally, the website contains proposed "minimum standards" guidelines for employers to use in tailoring their own policies and training programs.

The state's model policies, complaint form, FAQs, and minimum standard guidelines are in proposed form. New York State has invited comments on the draft guidance. The comment deadline is September 12, 2018.

Model Sexual Harassment Prevention Training

The state's model sexual harassment prevention training includes a sample script for trainers, model scenarios, and steps for reporting complaints. While the current guidance does not specify how long the required training must be, it explains that the training must include "some form of employee participation, meaning the training may: be web-based with questions asked of employees as part of the program; accommodate questions asked by employees; include a live trainer made available during the session to answer questions; and/or require feedback from employees about the training and the materials presented."

For an employer that chooses not to use the model created by the State Department of Labor and Division of Human Rights, the training must meet or exceed the state's minimum standards, which means that it must:

1. Be interactive;
2. Include an explanation of sexual harassment consistent with guidance issued by the state;

3. Include examples of conduct that would constitute unlawful sexual harassment;
4. Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
5. Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
6. Include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

The FAQs clarify that by January 1, 2019, employers must provide all employees with sexual harassment prevention training, either using the model created by the state or a comparable version that meets the state's minimum standards. Furthermore, new employees or employees who start after January 1 must complete the requisite annual sexual harassment training within 30 calendar days of hire. It is possible that this date will be pushed back based on comments from the employer community. For many industries, completing training in such a short period (October-December) will be very difficult.

Lastly, the FAQs also state that employers are "required to ensure that all employees receive training," including temporary/transient employees, or even if someone works for one day for the employer.

Note that for New York City employers, these requirements will need to be integrated with New York City training requirements effective in April 1, 2019.

Model Sexual Harassment Prevention Policy

The website also includes a model sexual harassment prevention policy. Employers may choose to distribute this model, which also includes a complaint form for employees to use, or modify an existing written policy to meet or exceed the state's minimum standards. If so, the sexual harassment prevention policy must:

1. Prohibit sexual harassment consistent with guidance issued by the state;
2. Provide examples of prohibited conduct that would constitute unlawful sexual harassment;
3. Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
4. Include a complaint form;

5. Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
6. Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
7. State that sexual harassment is considered a form of 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 to continue; and
8. State that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

The FAQs clarify certain aspects of the required sexual harassment prevention policy. For example, an employer must provide employees with a policy in writing, but can do so electronically, so long as employees are able to access the policy on a computer provided by the employer during work time and print a copy. Additionally, while the

FAQs note that an acknowledgment of receipt of the policy is not required, it is recommended.

New York State contractors also must submit an affirmation that they have a sexual harassment prevention policy and that they have trained all of their employees, beginning January 1, 2019.

Nondisclosure Agreements

The FAQs also address other aspects of the state's anti-sexual harassment legislation, such as nondisclosure agreements related to sexual harassment. In particular, the legislation allows only nondisclosure agreements related to sexual harassment settlements when the condition of confidentiality is the explicit preference of the complaining party. The law also requires a three-step process to memorialize the complaining party's preference in a signed agreement:

1. Any such term or condition must be provided to all parties, and the person who complained shall have 21 days to consider it.
2. If, after 21 days, such term or condition is the preference of the person who complained, such preference shall be memorialized in an agreement signed by all parties.
3. For a period of 7 days following the execution of an 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 FAQs state that as long as the statutory process and timeline are followed, the law does not prohibit the employer from initiating this process.

Next Steps

The state's guidance is not yet finalized and additional FAQs or guidance may be released after the September 12, 2018, comment period closes.

Jackson Lewis will continue to monitor updates regarding the final versions of these materials and any newly issued guidance. Please contact us with any questions related to harassment prevention policies, training, and other preventive practices and for assistance in submitting comments.

©2018 Jackson Lewis P.C. This Update is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Jackson Lewis.

For More Information Contact:

Timothy Domanick, Esq.
Associate
Jackson Lewis P.C.
58 South Service Road, Suite 250
Melville, NY 11747
Email: Timothy.Domanick@Jacksonlewis.com
Phone: (631) 247-4630

This article is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis P.C. and any readers. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances.

4848-7349-1313, v. 1