

Patterson Belknap Webb & Tyler LLP

Anti-Sexual Harassment Requirements in the Post -#MeToo Workplace

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Overview

- What is sexual harassment?
- Recent developments in New York state and city law regarding anti-sexual harassment measures

What Is Harassment?

What Constitutes Harassment?

- Harassment can take many forms, including but not limited to:
 - Touching or other unwanted physical contact
 - Sexually-explicit language, cursing, or other foul language
 - Posting offensive cartoons or pictures
 - Using slurs or other derogatory terms
 - Telling offensive or lewd jokes and stories
 - Using the organization's computers or e-mail system to display or distribute offensive content
- ***Harassment does not require an intent to offend. Thus, inappropriate conduct or language meant as a joke, prank, or even a compliment can lead or contribute to harassment.***

Sexual Harassment

Sexual harassment is a specific type of discriminatory harassment. Behavior that may constitute sexual harassment includes, but is not limited to:

- Unwelcome sexual flirtations, advances or propositions;
- Inappropriate touching of an individual's body;
- Graphic verbal comments about an individual's body or appearance;
- Sexually degrading words used to describe an individual; and/or
- The use of workplace computers (including via the Internet) or e-mail systems to display or distribute sexually explicit images, messages, or cartoons

Sexual Harassment

- According to the EEOC's guidelines, conduct constitutes harassment when:
 - Submission to the conduct is made explicitly or *implicitly* a term or condition of an individual's employment; or
 - Submission to or rejection of the conduct by an individual is used as the basis for employment decisions affecting the individual; or
 - The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- The standard under New York City and State law is even more expansive; liability is imposed whenever harassing conduct constitutes more than "petty slights or trivial inconveniences."
- *Note that, under federal and state law, the fact that a complainant participates in sexual conduct does not, per se, bar a claim*

New York Developments Regarding Anti-Sexual Harassment

New York State Model Sexual Harassment Policy

- Employers are required to adopt the Department of Labor's model anti-harassment prevention policy or establish a policy that meets the State's minimum standards.
- Policy Requirements include:
 - Policy must be provided in writing to all employees
 - Prohibit sexual harassment
 - Provide examples of prohibited conduct
 - Contain information regarding federal and state law and available remedies
 - Provide complaint form and procedure for investigation of complaints
 - Prohibit retaliation
 - Explain that sexual harassment is employee misconduct and sanctions will apply to those engaging in conduct and supervisory personnel who allow harassment

New York State Model Sexual Harassment Policy (cont'd)

- All employers must provide employees with their sexual harassment prevention policy and the information presented at their annual training.
- The policy and other information should be presented at the time of hire and during annual training.
- Employers must provide this information in English and in each employee's primary language.

Governor Cuomo Approves Sweeping Reform in August 2019

Governor Cuomo recently signed into law sweeping reforms that that would increase workplace protections against sexual harassment and other forms of employment discrimination. Key provisions include:

- **Statute of Limitations.** The bill extends the statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights (DHR) from one to three years.
- **Affirmative Defenses.** The bill eliminates part of the *Faragher/Ellerth* affirmative defense, which allows employers to avoid liability for harassment because an employee failed to file a formal complaint or follow a particular reporting procedure.

Governor Cuomo Approves Sweeping Reform in August 2019 (cont'd)

- **Fees & Damages.** The bill permits courts to award attorneys' fees on all claims of employment discrimination, and allows for punitive damages in employment discrimination cases against private employers.
- **Prohibition on Mandatory Arbitration.** The law prohibits mandatory arbitration clauses for discrimination claims. This prohibition may ultimately be preempted by the Federal Arbitration Act ("FAA").
 - *Latif v. Morgan Stanley*, No. 18-cv-1152, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019): Ruled that NY's ban on compelled arbitration conflicts with the FAA and is accordingly unenforceable.
- **Timing.** The majority of the provisions of the new reforms take effect on October 11, 2019.

Stop Sexual Harassment in New York City Act

- Permits gender-based harassment claims by all employees, regardless of employer size
- Extends statute of limitations under NYC Human Rights Law from one to three years
- Employers must post anti-harassment poster and distribute information to new hires
- Employers with 15 or more employees (including interns) will be required to provide annual and interactive sexual harassment training

NYC and NYS Sexual Harassment Training Requirements

- Employers must provide interactive training on an annual basis for all employees, including managerial and supervisory employees, and to new employees. The training must cover, among others things:
 - Examples of inappropriate conduct
 - Remedies available to victims of harassment
 - Outline administrative and judicial forums for bringing complaints
 - Provide training regarding conduct and responsibilities of supervisors
- NYC-based employers can comply with both the New York State and New York City training requirements by using the online training provided by the New York City Commission on Human Rights.
- Employers should maintain training records and employee acknowledgements.

Limitations on Non-Disclosure Provisions

- In the context of sexual harassment claims and other discrimination claims, New York State now prohibits employers from including contract terms that would prevent the disclosure of the underlying facts and circumstances related to a discrimination claim.
- If an employer settles a claim whose “factual foundation involves sexual harassment,” a non-disclosure clause is permitted only if:
 - The employee initiates the request for the clause and the request is memorialized in writing;
 - The employee is given 21 days to consider the clause before signing the settlement agreement; and
 - The employee is given an additional 7 days to revoke the clause
- An employer is permitted to *suggest* a confidentiality term, but the ultimate inclusion of the term must be the complainant’s preference.
- These limitations on confidential resolution also apply more broadly to employment discrimination claims under the new law signed by Governor Cuomo.

Training for the Board of Directors

- Neither the New York State or New York City Human Rights Law *expressly* requires annual training on sexual harassment for members of the Board of Directors.
- However it is an open question whether board members may qualify as “employees” for the purpose of these laws and therefore be subject to annual training requirements.
- Legislation has been proposed to amend the law to *explicitly* require board members to receive training.

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