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New York, State Developments

Racing Against the Clock: New York State Issues Final Guidance on Sexual Harassment Policies and Training

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As we previously reported **here**, **here**, and **here**, New York Governor Andrew Cuomo recently enacted an aggressive anti-sexual harassment law with stringent requirements for employers' anti-harassment policies and training. A key component of the new law goes into effect on October 9, 2018, and requires every employer in New York State to establish a sexual harassment prevention policy. In addition, New York State employers must provide employees with sexual harassment prevention training that, under the final guidance, must be completed by October 9, 2019 (i.e., one year after the law's effective date).

On October 1, 2018, only eight days before the law's effective date, the New York State Department of Labor (NYSDOL) and the New York State Division of Human Rights (DHR) released their final guidance and model materials under the new law. Since the publication of the initial draft on August 23, 2018, the NYSDOL made a number of significant changes to the final guidance and model materials, which include a model anti-harassment policy, model complaint form, and model training program. Alternatively, employers may adopt a similar policy and training program that meets or exceeds the minimum standards of the model policy and training.

Below are some highlights from the **final models and guidance** under this New York State law.

Model Sexual Harassment Prevention Policy

Under the amended New York State law, effective October 9, 2018, all employers in New York State must implement a sexual harassment prevention policy that complies with the law. Specifically, the NYDOL's model policy:

- notes that, while the state's policy specifically addresses harassment, discrimination against persons of all protected classes is prohibited;
- is no longer a "zero tolerance" policy, a position that is consistent with guidance from the U.S. Equal Employment Opportunity Commission (EEOC);
- adds that sexual harassment also includes harassment on the basis of "self-identified or perceived sex";
- clarifies that investigations will be kept confidential to the extent possible and that the investigation process set forth may vary from case to case; and
- removes the 30-day requirement to finish complaint investigations and now states that an investigation must be "prompt and thorough, commenced

immediately and completed as soon as possible."

The final FAQs also clarify various aspects of the model policy. For example, the FAQs explain that employers need not adopt the investigative procedure outlined in the state's model policy. If an employer has already established an investigative procedure similar (but not identical) to the state's model policy, the employer may outline such procedures in lieu of the procedure set forth in the state's model policy.

Critically, the model policy continues to include a detailed section describing employees' legal remedies and right to file charges with the DHR, the EEOC, and the New York City Commission on Human Rights (NYCCHR), or seek recourse from local law enforcement or a private attorney. Among other information, the state's model policy includes contact information for the DHR, EEOC, and NYCCHR.

Posting and Distributing the Sexual Harassment Prevention Policy

Under the new law, employers must provide employees with the policy in writing or electronically. If an employer makes a copy of the policy available on a work computer, workers must be able to print a copy for their own records. Employers must provide the policy to employees upon hiring.

The FAQs and the model policy clarify that while posting a copy of the policy is not required, posting it in an area that is highly visible (to the extent practicable) communicates an employer's effort to comply with the law.

Further, even though the New York State Human Rights Law now covers contractors, subcontractors, vendors, and consultants, the FAQs clarify that employers are not required to provide a policy to these individuals. However, employers are "encouraged" to provide the policy to anyone who provides services in the workplace.

While employers are not required to obtain signed acknowledgement forms that employees have received and read the policy, the FAQs encourage employers to keep signed acknowledgements.

Complaint Form

The minimum standards require that a sexual harassment policy include a written **complaint form**. While the FAQs clarify that the complaint form need not be included in full in the policy, employers "should . . . be clear about where the form may be found, for example, on a company's internal website."

Notably, the finalized model complaint form does not ask whether the individual has filed a claim with a government agency or a lawsuit in connection with the complaint, or whether the complainant has hired an attorney. However, it still provides an opportunity to share this information. The finalized model complaint form also removes statements that informed the employee that he or she may file claims with other entities or in court, which was largely duplicative of the information contained within the state's model policy.

Model Sexual Harassment Prevention Training

One major change in the finalized guidance is that New York State eliminated the requirement that employers complete all sexual harassment prevention training by January 1, 2019. Under the new guidance, employers must fulfill the initial annual training requirement by October 9, 2019, and annually thereafter. The state also eliminated the requirement that employers train new hires within 30 days of hire. Rather, the final guidance requires employers to provide training to new employees "as quickly as possible."

According to the FAQs, all employees in New York—including part-time, temporary, and seasonal employees—must receive training. However, employers are not required to train third-party vendors or other nonemployees who interact with New York State employees (although employers are encouraged to provide a copy of the anti-harassment policy and training to such individuals).

The FAQs also state that the training requirement applies only to those employees who work or who will work in New York. However, if an individual works any portion of their time in New York State, even if the employee is based in another state, he or she must receive the training. Notably, the FAQs do not describe the minimum contacts with New York State before training is required, meaning that a single day spent in the state may trigger the training requirement.

The final guidance on the annual training requirement also provides the following additional clarification:

- Employers are not required to include the verbatim language outlined in the state's model training materials. Rather, training programs must meet the minimum standards published by the state. Employers may exclude certain sections in the state's model training, except those that are expressly required.
- Employers must train all employees—not just those in managerial or supervisory roles—regarding the extra responsibilities of supervisors.
- Training must be "interactive." A training program in which an individual watches a training video or reads a document only and does not have a feedback mechanism or interaction is not interactive under the guidance. Examples of interactive trainings include the following:
  - "If the training is web-based, it has questions at the end of a section and the employee must select the right answer;
  - If the training is web-based, the employees have an option to submit a question online and receive an answer immediately or in a timely manner;
  - In an in-person or live training, the presenter asks the employees questions or gives them time throughout the presentation to ask questions;
  - Web-based or in-person trainings that provide a Feedback Survey for employees to turn in after they have completed the training."
- The guidance does not require trainings to be of a specific minimum duration, provided that trainings meet or exceed the state's minimum standards.

Other Notable Final Guidance

As we **previously reported**, effective July 11, 2018, employers in New York State are prohibited from requiring nondisclosure clauses in any settlement or release of claims if "the factual foundation for which involves sexual harassment." An exception exists if the condition of confidentiality is the complainant or plaintiff's preference. If an employer includes such language, the complainant or plaintiff must be given 21

days to consider the term or condition, and the employer must memorialize its preference in an agreement signed by all parties. Then the complainant or plaintiff must have at least seven days following the execution of such agreement to revoke the agreement if he or she chooses to do so. The nondisclosure clause cannot go into effect or become enforceable until after the revocation period has expired.

The state's FAQs clarify that, for such a nondisclosure agreement to be effective, the parties must enter into two separate agreements: (1) a first agreement that "memorializes the preference of the person who complained" in compliance with the 21-day waiting and 7-day rescission periods; and (2) a second agreement that contains the nondisclosure provision and any other terms and conditions of the parties' agreement.

Notably, according to the state's FAQs, the 21-day consideration period may not be waived or otherwise shortened. Rather, the 21-day period must expire before the first agreement is signed (i.e., when the complainant's preference is memorialized in an agreement signed by the parties), and the minimum 7-day revocation period does not start to run until after that agreement is executed. This practice differs from the similar waiting and rescission periods required for releases of age discrimination claims under the federal Age Discrimination in Employment Act (ADEA). The FAQs acknowledge that the ADEA allows employers 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." In contrast, for a valid nondisclosure agreement of claims involving sexual harassment, "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."

New York City also recently passed a separate anti-sexual harassment law, which will become effective on April 1, 2019. Ogletree Deakins will continue to monitor developments on these state and local legislations and will post updates on the **firm's blog** as additional guidance becomes available.