STROOCK
SPECIAL BULLETIN

# New York State and New York City Issue New Compliance Mandates to Address Sexual Harassment

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Last spring, we published Stroock Special Bulletins outlining New York State https://www.stroock.com/siteFiles/Publications/CuomoSigns2019BudgetBillModelHarassmentPolicy.pdf and New York City https://www.stroock.com/siteFiles/Publications/deBlasioSignsStopSexualHarassmentinNYCAct.pdf legislative initiatives to strengthen prohibitions against sexual harassment in the workplace.

As described in more detail below, effective October 9, 2018, **all** employers in New York State are required to adopt a sexual harassment prevention policy that equals or exceeds the standards of a New York State-issued model policy.

Also as of October 9, 2018, **all** New York employers must provide annual sexual harassment prevention training that equals or exceeds a New York State-created model program. This training must be completed for current employees by January 1, 2019; however, there is a shorter deadline for new hires—those employees must complete the training within 30 days of hire.

New York City promulgated a similar training requirement for New York City-based employers, which becomes effective April 1, 2019. Unlike the New York State training, the New York City mandate applies to employers with 15 or more employees.

Starting September 6, 2018, New York City employers are required to post a sexual harassment poster https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x11.pdf and distribute a fact sheet to all new employees https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf.

Since these new laws require compliance within a relatively short time period, it is imperative that New York employers focus on these mandates to ensure compliance.

## New York State Model Policy

Effective October 9, 2018, all New York State employers are required to adopt a sexual harassment complaint policy which must include:

- a statement prohibiting sexual harassment consistent with guidance issued by the New York State Department of Labor (DOL) in

consultation with the New York State Division of Human Rights (NYSHRL) (Guidance);

- examples of conduct that constitutes unlawful sexual harassment;
- a statement that sexual harassment is considered a form of misconduct and that (i) individuals engaging in sexual harassment and (ii) supervisors and managers who knowingly permit such behavior to continue, will be subject to disciplinary action;
- an internal complaint procedure for the timely and confidential—to the extent possible—investigation that "ensures due process" for all parties;
- a complaint form;
- a clear statement that retaliation against individuals who complain about sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is illegal;
- information about federal and state laws prohibiting sexual harassment, including potential remedies available to victims of sexual harassment;
- a statement that there may be local laws which also prohibit sexual harassment—in New York City, the New York City Human Rights Law (NYCHRL); and
- a statement advising employees of all rights of redress and all forums for adjudicating sexual harassment complaints in administrative and judicial proceedings.

To assist employers, New York State has issued a draft model anti-sexual harassment policy https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf, which was subject to public comment until September 12, 2018, and subsequently will be finalized. New York State has also published a document setting forth the minimum standards required for such policies. https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionPolicies.pdf.

Highlights of, and questions raised by, the draft model policy include:

- a statement that the employer has "zero tolerance" for any form of sexual harassment. Yet, the Federal Equal Employment Opportunity Commission (EEOC) long has criticized that term, reasoning that it conveys a one-size-fits-all approach in which all inappropriate conduct is disciplined in the same manner which, in turn, may actually discourage victims of sexual harassment from reporting the misconduct;
- examples of conduct that would constitute unlawful sexual harassment and a detailed explanation of retaliation;
- a statement that sexual harassment includes harassment on the basis of sex, sexual orientation, gender identity and the status of being transgender;
- a statement that "managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe" in accordance with the employer's policy. In contrast, employees, applicants, interns (whether paid or unpaid), contractors and persons conducting business with the employer are "encouraged" to and "should" report sexual harassment prohibited by the policy;
- a statement that an investigation of any complaint "should be completed within 30 days";
- a statement that the investigation will be "confidential to the extent possible." Curiously, in other places, the draft model policy seemingly promises complete confidentiality. Similarly, the model complaint form asks whether the complainant wants the employer to investigate the

complaint in a confidential manner. However, as the EEOC long has noted, total confidentiality is not possible given the need to conduct a thorough investigation, including interviews of witnesses and the alleged harasser;

- a statement that "[a]ll persons involved, including complainants, witnesses and alleged perpetrators will be accorded due process to protect their rights to a fair and impartial investigation." Due process is a constitutional concept protecting individuals against unreasonable governmental—not private sector employer—actions. Therefore, many question the use of that term in this context; and
- a detailed outline of the investigative steps, such as (i) conducting an "immediate review of the allegations"; (ii) taking interim actions, as appropriate; (iii) encouraging the complainant to complete a written complaint form and if he or she refuses, preparing a complaint form based on the oral reporting; (iv) taking action to obtain and preserve documents, emails and phone records relevant to the investigation; (v) interviewing all parties, including witnesses; (vi) creating written documentation of the investigation that includes certain enumerated information; (vii) promptly notifying the complainant of the final determination and implementation of any corrective and disciplinary measures; and (viii) informing the complainant of his or her right to file an external complaint or charge.

New York State has provided additional guidance for employers. Among other things, employers must post the policy prominently at all locations and provide the policy to new employees at the commencement of their employment. While employers are not required to obtain a signed statement acknowledging receipt of the policy, they are encouraged to do so. Employers may maintain the policy electronically; however, employees must be able to access the policy on a company-provided computer during work time and must be able to print a copy for their records.

## New York State Model Training

Turning to the mandatory training, New York State has issued a fully scripted model training program https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentDRAFTModelTraining.pdf, which by-and-large mirrors what must be included in the model anti-sexual harassment policy. At a minimum, the training must:

- include an explanation of what constitutes sexual harassment consistent with the Guidance;
- identify examples of conduct that would constitute unlawful sexual harassment;
- incorporate information about federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- include information concerning employees' rights of redress and all available forums for adjudicating complaints;
- highlight information addressing conduct by managers and supervisors and additional responsibilities of such individuals; and
- be interactive—that is, (i) enable employees to ask questions as part of the program; (ii) include a Question and Answer component to accommodate employee questions; (iii) have a live trainer conduct the program or make a live trainer available to answer questions; or (iv) require employee feedback about the training. New York State encourages employers to implement as many of these interactive components as feasible.

After the initial training, all employees must complete a training session at least once each year, giving the employer discretion to use a calendar year, start date anniversary or another date. One

aspect of the New York State Guidance that likely will create compliance issues is the interpretation that the training mandate applies to all employees, even temporary and transient employees who only work in New York State for just one day.

## Looking Forward

All employers must immediately review and revise their policy prohibiting sexual harassment. Of course, a threshold question is whether the employer should adopt a stand-alone anti-sexual harassment policy, such as the New York State model policy, or incorporate the new requirements into the company's existing anti-harassment policy, which typically prohibits harassment based on all protected characteristics, and not just sexual harassment. We anticipate that most employers will opt for the latter, which requires a more detailed and nuanced review of the company's existing policies. Regardless of which option is chosen, given that the October 9, 2018 deadline is fast approaching, it is important that employers immediately start this policy review. Further, it is possible that New York State will tweak the timeframe for completing the training based on the public comments. Nevertheless, employers should begin plans to conduct training that meets or exceeds the requirements of the New York State model training.

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