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# New York Employers Beware: Are You In Compliance with the New Sexual Harassment Laws?

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## Attorneys

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Anyone who owns or runs a business in New York has likely watched with great interest the growing media coverage of sexual harassment claims and #metoo confessionals. Those same employers may also be wondering with a growing sense of unease whether their policies and procedures are strong enough to combat this type of workplace issue. New York has answered that question for employers—and the answer is likely "no."

In response to growing concerns regarding sexual harassment claims, New York has enacted extensive sexual harassment laws that apply to *all* New York employers, both public and private. The new legislation includes the creation of minimum standards for sexual harassment policies and training programs, the extension of protection against sexual harassment to non-employees, and the requirement for annual sexual harassment training. With compliance deadlines beginning as early as October 9, 2018, all business owners must take immediate action.

### **SEXUAL HARASSMENT PREVENTION POLICY**

The first step for employers is to ensure that they have a compliant written sexual harassment policy that is in place and distributed to employees by October 9, 2018. Employers would be wise to obtain a signed acknowledgment of receipt from each employee. While it is possible that an employer's existing sexual harassment policy already meets the new standards, it is unlikely. For example, an employer's policy must now contain a complaint form, examples of unlawful sexual harassment, and information about procedures for filing claims with external anti-discrimination agencies. New language to be included in the policy also makes managers and supervisors mandatory reporters in that they are required to report any complaint they receive or harassment they observe.

To assist employers in their compliance efforts, the New York State Department of Labor ("NYS DOL") has made available on its website a model policy and complaint form. Employers can simply adopt the model policy and complaint form prior to the October deadline or, alternatively, use them to compare against their own existing policy and complaint form to ensure

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that they are compliant.

The models are marked as drafts and are subject to change following a review of suggested revisions collected during a public comment period that ended on September 12, 2018; the NYSDOL has not indicated when the final version will be available. Because of the tight compliance deadlines, employers should make use of the drafts and not wait for a final version.

Employers should also review other existing policies, such as those pertaining to social media, to ensure that they are aligned with sexual harassment case law and the new legislation.

### **SEXUAL HARASSMENT PREVENTION TRAINING**

The recently enacted legislation also requires New York employers to conduct sexual harassment training on an annual basis and in a manner that meets or exceeds newly established minimum standards. Employers who have not held compliant sexual harassment training for all their New York employees in 2018 will need to do so by January 1, 2019.

To be compliant, the training must have an interactive component, where employees can ask questions and give feedback, and contain specific content including examples of conduct that constitutes unlawful sexual harassment and a discussion of all available forums for adjudicating sexual harassment complaints in both administrative agencies and courts.

After the initial training is conducted by the January 2019 deadline, sexual harassment training must be conducted on an annual basis, with new employees being trained within 30 days of their employment date.

The NYSDOL has also made available on its website model sexual harassment prevention training for employers to use for training or for comparison against their own training modules to determine compliance. As with the model policy, the model training is in draft form and subject to change pending review of the public comments.

### **SEXUAL HARASSMENT AND NON-EMPLOYEES**

A new area of concern for business owners involves an amendment to the New York Executive Law that expands protection from sexual harassment to non-employees in the workplace. A non-employee would include contractors, subcontractors, consultants, and vendors, as well as their employees. This means that employers now face liability for instances of alleged sexual harassment against non-employees if: (1) the employer, its agents, or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace; and (2) the employer failed to take immediate and appropriate corrective action. The extent of the employer's control with respect to the conduct of the harasser will also be considered.

These changes mean that employers should take steps to inform non-employees entering the workplace of their sexual harassment prevention policies. New best practices should also be considered to prevent sexual harassment by non-employees against employees in the workplace.

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### **CONFIDENTIALITY AGREEMENTS & NONDISCLOSURE AGREEMENTS IMPACTED**

The new legislation also prohibits the use of confidentiality or nondisclosure agreements in connection with any settlement, agreement, or other resolution of any claim whose factual foundation involves sexual harassment. An exception to this is where the claimant prefers confidentiality, as evidenced by the allowance of a 21-day review period and 7-day right of revocation in the agreement.

### **MANDATORY ARBITRATION PROHIBITION**

The new legislation prohibits mandatory arbitration as a means to resolve any allegation of unlawful sexual harassment as a condition of enforcement of contract or obtaining remedies under a contract. Please note that where this amendment is inconsistent with federal law or a collective bargaining agreement, the federal law or collective bargaining agreement will control.

### **COMPETITIVE BIDDING CERTIFICATION**

Effective January 1, 2019, all state and local municipal departments or agencies must require competitive bids to include a certification from the bidder stating, under penalty of perjury, that the bidder has implemented a compliant written sexual harassment policy and annual training program. If a competitive bidder is unable to so certify, the bidder must submit a signed statement that sets forth in detail the reasons for the noncompliance. Where competitive bidding is not required, whether a certification must accompany a bid is at the discretion of the governmental department or agency.

### **REIMBURSEMENT TO A PUBLIC ENTITY FROM EMPLOYEE**

Under an amendment to the New York Public Officers Law that became effective on April 2, 2018, when an employee of a public entity has been adjudicated to have committed sexual harassment, the employee must reimburse the public entity for any damages paid by that public entity. The employee must pay within 90 days of the payment or the public entity can, upon obtaining a money judgment, garnish the employee's wages. Public entities include counties; towns; cities; villages; political subdivisions; school districts; BOCES; and entities operating colleges, community colleges, public schools, or special districts.

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This memo does not cover employers who are subject to New York City laws. Also, this memo is not intended to cover how the new laws affect employers who operate under collective bargaining agreements; collective bargaining agreements are only discussed in a cursory manner.

Please note that this article is meant for general information purposes and is not to be considered as legal advice. If you would like to speak with us about your business and how you are affected by the content discussed in this article, we invite you to contact us at 845-561-0550.