



LAMB & BARNOSKY, LLP

TRUST. PERSONAL ATTENTION. RESULTS.

MEMORANDUM

TO: OUR EMPLOYER CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: OCTOBER 9, 2018

RE: FOLLOW UP - FINAL ANTI-SEXUAL HARASSMENT MODEL POLICY AND TRAINING MATERIALS

KEEPING YOU INFORMED...

As we advised you in our October 1, 2018 client memo, New York State recently released the final versions of its model policy regarding sexual harassment in the workplace, model training materials, FAQs and other related documents. Below is a list of the significant changes to each document. As a reminder, employers must adopt and provide a sexual harassment prevention policy to all employees by **today October 9, 2018**. Notably, employers must provide training on their sexual harassment policy by **October 9, 2019**, not January 1, 2019, as was originally required in the draft guidance documents.

I. Model Policy

We have prepared a model policy based upon what the State issued and have shared it with those of our clients who have requested it. If you are in need of a policy, contact us.

According to the State's employer's toolkit, an employer must provide all employees with the policy in writing. This can be done electronically via e-mail, provided that employees have the ability to print a copy. The State recommends that the policy and any related training be in a language(s) spoken by your employees and that all new hires receive the policy before commencing work.

A. *Your sexual harassment policy must meet the minimum standards to be compliant with Section 201-g of the Labor Law.*

The State has now provided a minimum standards checklist for employers to use if they choose not to adopt the State's model policy verbatim. Employers may use an existing policy so

long as it meets the State's minimum standards. The policy must:

- “Prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- 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;
- Include a complaint form;
- Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- Clearly 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
- Clearly 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.”

B. Important changes made to the State's model policy.

The State's final model policy expands the definition of “employees” to include contractors and persons conducting business with the employer “regardless of the persons' immigration status.” It also expands the definition of sexual harassment to include harassment based on “self-identified or perceived sex, and gender expression.” This is in addition to harassment based on gender identity and transgender status, sex, and sexual orientation. The State's model policy adds that employees in certain industries may have additional legal protections besides those afforded by Title VII and New York State's Human Rights Laws.

With respect to posting your policy, the State's model policy provides that “it should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location).” The State created an optional poster entitled “Sexual Harassment Prevention Policy Notice.”

The State also broadened the prohibited conduct examples list to include not only physical assaults of a sexual nature, but also “physical acts (*i.e.*, kissing and hugging).” Sex stereotyping has also been added as an example of prohibited conduct. According to the model policy, sex stereotyping occurs when “conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look.” The State's model policy also notes that sexual harassment may occur outside of the physical workplace including “conduct on personal devices.”

With respect to investigations of complaints, the State's final model policy has changed in the following ways:

- The prior 30-day deadline to complete an investigation has been removed. Instead, the State's policy mandates that “investigations should be commenced immediately and completed as soon as possible.”

- In the draft model policy, employers were provided with a list of steps to follow to conduct investigations and were required to follow these steps for *every* investigation. The final model policy acknowledges that the investigatory process may vary from case to case, and outlines the steps to be taken when conducting an investigation.
- The list of interim (temporary) actions pending an investigation has been expanded to include instructing the harasser to refrain from communicating with the complainant.
- The final policy adds that documents relating to the investigation should be kept in a secure and confidential location.

With regard to retaliation, the final model policy adds the following:

- An individual is protected from retaliation if he/she had a good faith belief that the complained-about practices were unlawful; however, if the claim is intentionally false, the individual is not protected.
- The State added “threats of physical violence outside of work hours” as an example of unlawful retaliation.
- The State added counseling and suspension as possible disciplinary actions to which employees may be subject if they violate the policy.

II. Frequently Asked Questions (FAQs)

The revised FAQs clarify that the complaint form does not need to be included in the policy. Employers should tell covered individuals where the form may be accessed (for example, on the employer’s internal website).

The FAQs also provide that employers are not required to obtain a signed acknowledgement that a covered individual has read the policy. We recommend that every employer maintain a signed acknowledgement form each time it provides a copy of the policy to an employee (*e.g.*, if given during an investigation), as well as sign-in sheets for each training session.

III. The State’s Model Training Materials

Employers must provide sexual harassment training pursuant to their policy by **October 9, 2019**. The State recommends that all new employees after that date receive training as soon as possible.

A. *Your training materials must meet the minimum standards to be compliant.*

The State has provided a minimum standards checklist for annual training on sexual harassment. According to the checklist, the training must:

- “Be interactive;
- Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Include examples of conduct that would constitute unlawful sexual harassment;
- Include information concerning the 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; and
 - Include information addressing conduct by supervisors and any additional responsibilities for such supervisors."

B. Important changes made to the State's model training materials.

The State has issued specific guidance on what "interactive" training requires; *i.e.*, there must be "some level of feedback from those being trained." The training "may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation." The training "should include as many of the following elements as possible: ask questions of employees as part of the program; accommodate questions asked by employees, with answers provided in a timely manner; and require feedback from employees about the training and the materials presented."

The model training materials now suggest that "to every extent possible, employee training should be given consistently (using the same delivery method) across the workforce to ensure understanding at every level and at every location. It is every employer's responsibility to ensure all employees are trained on the employer's standards and are familiar with the organization's practices."

The model training provides guidance on the disclosure of personal information during a training session. It states, in relevant part, "on occasion, a participant may share a personal or confidential experience during the training. If this happens, the trainer should interrupt and recommend the story be privately discussed and with the appropriate office contact. After the training, follow up with this individual to ensure they are aware of the proper reporting steps. Managers and supervisors must report all incidents of harassment."

We have, for many years, been conducting anti-sexual harassment trainings that are customized to our client's policies. While the State has provided model documents, the "one-size fits all" approach does not take into account your workplace's unique workplace needs and culture. Please contact Richard K. Zuckerman, Sharon N. Berlin, Alyson Mathews, Alyssa L. Zuckerman or one of our other attorneys at 631-694-2300 if you would like assistance creating and implementing a customized training program for your workplace.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.