



DEBORAH BUYER LAW

FOR THE BETTER

NYS Workplace Anti-Harassment Amendments – Final Guidance Issued October 2018

New York State recently issued final guidance regarding employer compliance with the NYS Workplace Anti-Harassment Amendments (“NYS Act”). This guidance (which can be found at <https://www.ny.gov/combatting-sexual-harassment-workplace/employers>) includes:

- Sexual Harassment Prevention Model Policy (“Model Policy”)
- Minimum Standards for Sexual Harassment Prevention Policies
- Sexual Harassment Prevention Poster
- Sexual Harassment Prevention Toolkit for Employers
- Model Complaint Form (“Model Complaint Form”)
- Sexual Harassment Prevention Model Training, including a script and power point presentations (“Model Training”)
- Minimum Standards for Sexual Harassment Prevention Training
- FAQs

Sexual Harassment Prevention Policy

Under the NYS Act, employers must adopt and provide a sexual harassment prevention policy to all employees by October 9, 2018, that meets or exceeds the NYS Act’s minimum requirements. The policy must be provided to all employees, including upon hiring, and should be posted prominently in all work locations to the extent practicable.

Under the NYS Act, the policy must prohibit sexual harassment and provide examples of prohibited conduct; include information concerning the federal and state law and remedies available to victims and state that there may be applicable local laws; include a complaint form; include a procedure for timely and confidential investigation that ensures due process for all parties; inform employees of their rights and available forums for adjudicating complaints; clearly state that sexual harassment is misconduct and that sanctions will be enforced against harassers and against supervisory and managerial personnel who knowingly allow such behavior to continue; and clearly state that retaliation is unlawful.

Notably, certain of these requirements may not currently be included in a typical employer’s sexual harassment policy, such as information on federal and state statutes and remedies available, and the inclusion of a complaint form, an investigation procedure, and information on employees’ rights of redress and all available administrative and judicial forums.



NYS Workplace Anti-Harassment Amendments (“NYS Act”) – Final Guidance October 2018

Employers may use the Model Policy and Model Complaint Form or establish (or update) their own policy to meet or exceed the minimum standards of the NYS Act. NYS also provides a poster as an “optional tool” to be displayed in a highly visible place to direct employees and non-employees regarding the employer’s sexual harassment prevention policy.

Sexual Harassment Prevention Training

Additionally, all employers must provide employees with an interactive sexual harassment prevention training program, which includes an explanation of sexual harassment; examples of prohibited conduct; information concerning federal and state law and remedies available to victims; and information on employees’ rights and available forums for adjudicating complaints. The training must also address conduct by supervisors and any additional responsibilities for such supervisors. All employees must complete this training before October 9, 2019 and then annually thereafter. Any new employee must complete this training as soon as possible after his/her start date. (Notably, the final guidance eliminated the January 1, 2019 training deadline for current employees and the 30-day training deadline for new employees, that had been included in the previously issued draft guidance.)

Employers may use the Model Training in conjunction with the Model Policy, or may establish their own training that meets or exceeds the minimum standards of the NYS Act. Notably, NYS guidance acknowledges that there are provisions in the Model Training that are not expressly required in the law. The guidance states that while those provisions are not mandatory, “they are strongly recommended. In addition, employers are encouraged to exceed the minimum training requirements.”

Broad Coverage of Employees and Non-employees

The Model Policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with the employer. The Model Policy defines a “non-employee” as someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, “gig” workers and temporary workers. Also included are persons providing equipment repair, cleaning services, or any other services provided pursuant to a contract with the employer.

The guidance states that employers do not have to provide a sexual harassment prevention policy to independent contractors, vendors or consultants. However, since the NYS Human Rights Law imposes liability on the employer for their actions, NYS encourages (but does not



NYS Workplace Anti-Harassment Amendments (“NYS Act”) – Final Guidance
October 2018

require) employers to provide the policy and training to anyone providing services in the workplace.

Finally, the guidance encourages witnesses to report instances of sexual harassments and/or tell coworkers “that’s not okay”.

Addition of “Sex Stereotyping”

The Model Policy includes “sex stereotyping” as a form of sexual harassment, and states that 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 Model Training adds that “sex stereotyping” includes harassing a person because that person does not conform to gender stereotypes as to “appropriate” looks, speech, personality, or lifestyle. According to the Model Training, harassment because someone is performing a job that is usually performed, or was performed in the past, mostly by persons of a different sex is also sex discrimination. The guidance indicates that sexual harassment can be based on sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

Responsibilities of Managers and Supervisors

Under the NYS Act, a sexual harassment prevention policy must clearly state that “sanctions will be enforced...against supervisory and managerial personnel who knowingly allow such behavior to continue.” The NYS Act also requires that the sexual harassment prevention training must address conduct by supervisors “and any additional responsibilities for such supervisors”.

The Model Policy states that managers and supervisors are under a higher obligation to report any harassment that they observe “or become aware of”, and are prohibited from allowing any sexual harassment to continue. The Model Training extends that obligation further to include harassment that managers and supervisors “should have known of with reasonable care and attention to the workplace for which they are responsible.” Additionally, the Model Training requires supervisors and managers to report any harassment that is reported to them, that they observe, or know of, even if no one is objecting to the harassment; even if they think the conduct is trivial; and even if the harassed individual asks that it not be reported.

Complaint Form

Under the NYS Act, the policy must “include a standard complaint form”. However, NYS guidance indicates that while the complaint form does not need to be included in full in the policy, “[e]mployers should, however, be clear about where the form may be found, for



NYS Workplace Anti-Harassment Amendments (“NYS Act”) – Final Guidance October 2018

example, on a company’s internal website.” According to the guidance, employees can submit the complaint form in writing, on their own behalf or on behalf of another employee. Employees can also submit verbal complaints, and then the employer completes the complaint form.

Investigation Process

Under the NYS Act, the policy must include a procedure “for the timely and confidential investigation of complaints that ensures due process for all parties”. Both the Model Policy and the Model Training include an investigation process that may be far more detailed than the investigation process in a typical employer’s current policy. The Model Policy and Model Training provide for the following investigation process: the investigation must be commenced immediately, completed as soon as possible, and kept confidential to the extent possible; if the reporting party made a verbal complaint, then the employer must complete a “Complaint Form” based on the verbal reporting; the employer must obtain, review and preserve all relevant documents; the employer must interview all parties, including witnesses; the employer must create written documentation of the investigation (containing a list of all documents reviewed, along with a detailed summary of relevant documents, a list of names of those interviewed, along with a detailed summary of their statements, a timeline of events, a summary of prior relevant incidents, reported or unreported, and the basis for the decision and final resolution of the complaint, together with any corrective actions); the employer must keep records in a “secure and confidential” location; and the employer must inform the reporting party of the right to file a complaint externally.

The Model Policy and Model Training require the employer to notify both the reporting party and the person about whom the complaint was made of the final determination. The Model Policy requires the employer to implement correction action, and the Model Training requires the employer to give notice that corrective action has been taken.

Notably, the final guidance eliminated the requirement from the prior draft guidance issued by NYS that such investigations should be completed within 30 days. Now, investigations must be “commenced immediately” and “completed as soon as possible”.

Other Types of Harassment or Discrimination

The guidance briefly mentions, but does not particularly extrapolate on, policies and training related to discrimination or harassment based on other “protected classes” in NYS, which include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history. The Model



NYS Workplace Anti-Harassment Amendments (“NYS Act”) – Final Guidance
October 2018

Training includes without extrapolation that “[m]uch of the information presented in this training applies to all types of workplace harassment.”

“Interactive” Training

Under the NYS Act, the sexual harassment prevention training must be interactive. According to the Model Training, the training may be presented to employees individually or in groups; may be in person, via phone or online; and may be via webinar or recorded presentation. The guidance also states that training should be given consistently, i.e., “using the same delivery method” across the workforce.

The Model Training indicates that the training should include as many of the following elements as possible: (a) ask questions of employees as part of the program, (b) accommodate questions asked by employees, with answers provided in a timely manner, (c) require feedback from employees about the training and the materials presented.

NYS guidance provides the following examples of “interactive training”:

- 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.

An individual watching a training video or reading a document only, with no feedback mechanism or interaction, would NOT be considered interactive. While a best practice for effective and engaging trainings, a live trainer is not specifically required. Live trainers may appear in person or via phone, video conference, etc. The Model Training also states that training may include additional interactive activities, including an opening activity, role playing or group discussion. NYS guidance indicates that the State will offer training sessions.

Language Requirements

The Model Training states that employers should provide employees with training in the language that is spoken by their employees. When an employee identifies as a primary language one for which a template training is not available from the State, the employer may provide that employee an English-language version. However, as employers may be held liable



NYS Workplace Anti-Harassment Amendments (“NYS Act”) – Final Guidance
October 2018

for the conduct of all of their employees, NYS strongly encourages employers to provide the policy and training in the language spoken by the employee.

Other Protections/Remedies under Federal, NYS and Local Law.

Both the Model Policy and Model Training inform employees of other protections and remedies under NYS law, federal law, and local law, including contact information of the relevant government agencies (NYSDHR, NYCCHR, EEOC). These references are not typically included in employer handbooks, but are now required by the NYS Act. The Model Policy and Model Training also indicate that a reporting party may, and perhaps should, contact the local police as needed. Finally, the Model Training also suggests that if an employee is not sure he/she wants to pursue a complaint at the time of potential harassment, he or she should document the incident to ensure it stays fresh in mind.

Records

While not required under the NYS Act, the NYS guidance encourages employers to have employees acknowledge receipt of the employer’s policy. Additionally, NYS encourages (but does not require) employers to provide the policy and training to “anyone providing services in the workplace”. NYS further encourages employers to keep a copy of all training records.

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm’s attorneys:
Deborah Buyer, 212-225-8483 x1, deborah@deborahbuyerlaw.com
Lydia Fan Wong, 212-225-8483 x2, lydia@deborahbuyerlaw.com

© Deborah Buyer Law PLLC 2018 These materials do not constitute legal advice or create an attorney-client relationship. The reader is advised to consult with an attorney to obtain legal advice.

U.S. Treasury Circular 230 Notice: U.S. Treasury Regulations require us to inform you that any U.S. tax advice in this communication cannot be used by you to avoid tax penalties or to promote, market or recommend to another party any transaction or matter addressed herein.