

[Podcast]: New York State Anti-Harassment Law

Law and the Workplace Blog on **October 8, 2018**

In this episode of The Proskauer Brief, partner [Evandro Gigante](#) and associate [Laura Fant](#) discuss recent amendments to New York State law prohibiting sexual harassment. The law will require employers to distribute policies prohibiting sexual harassment in the workplace and implement annual training on sexual harassment. These policies, which must be distributed by October 9, 2018, are required to satisfy certain minimum standards set by the new guidance. In addition to the policy requirement, all employees in New York State must receive anti-harassment training on an annual basis. Be sure to tune in and find out how employers can fulfill their obligations under this new law.

Evandro Gigante: Hello. Welcome to the Proskauer Brief, Hot Topics on Labor and Employment Law. I'm Evandro Gigante and on today's episode I'm joined by Laura Fant and we're going to discuss recent developments regarding the New York State anti-harassment laws. As many of you know, New York State recently implemented laws requiring employers to distribute policies prohibiting harassment in the workplace and implementing training on sexual harassment. I'm going to speak first about the policy requirement and Laura is going to speak about the training requirement.

First, the deadline by which employers will need to distribute compliant sexual harassment policies is October 9th, 2018. Those policies will require that employers distribute language meeting certain minimum standards set by the new guidance. Those minimum standards include first that the policy prohibit sexual harassment consistent with guidance that's been issued by New York State.

Second, those policies must include examples of prohibited conduct that would constitute unlawful sexual harassment.

Third, the policy must include information concerning federal and state statutory provisions concerning sexual harassment, as well as remedies available to victims of sexual harassment and a statement that there may be applicable local laws governing sexual harassment.

Fourth, the policy must include a complaint form, which I will get to in a moment.

Fifth, the policy must include a procedure for the timely and confidential investigation of complaints in a manner that ensures due process for all parties.

Sixth, the policy must inform employees of their rights of redress in all available forms in which to adjudicate sexual harassment complaints both administratively and judicially.

Seventh, the policy must clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be forced against employees engaging in sexual harassment and against supervisory or managerial personnel who knowingly allow such behavior to continue.

Finally, policies must 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.

Laura Fant: Evandro, you mentioned a complaint form as one of the requirements. Can you tell us a little bit more about that?

Evandro Gigante: Sure. So the new law requires that employers not only distribute policies that comply with the latest requirements but also that employers have in place a complaint form that employees can use in order to raise complaints of harassment. That complaint form, at least the form of it, was issued by the State recently and includes information such as the nature of the complaint being made, as well as an opportunity for the employee to describe what happened and what the conduct complained of actually was, the dates the discrimination or the harassment occurred, the names of any witnesses or individuals who may have information relating to that complaint.

Laura Fant: That sounds like all good information you would want to be gathering in the course of an investigation in any case.

Evandro Gigante: That's correct.

Laura Fant: So you mentioned the October 9th, 2018 deadline for employers to be distributing their compliant policies. How exactly should employers go about doing that distribution? Are there any requirements?

Evandro Gigante: Yes. So the State requires that all employees receive the policy in writing or electronically. If the policy is provided to employees in electronic format, those employees must be able to print a copy of the policy and maintain it for their records. In addition to that, all new hires going forward, starting from October 9, 2018 will need to receive the policy upon hire. Beyond that, the State guidance encourages but does not require employers to post a copy of the policy. In addition to that, the statute does not require employers to obtain acknowledgements that employees have received the policies, although acknowledgements are encouraged.

Laura Fant: This is a lot of requirements and we're on a pretty short timeline here. How exactly can employers go about fulfilling their obligations under this new law?

Evandro Gigante: The State has actually assisted in that process by issuing not just the guidance and the rules around how to issue compliant policies but has actually issued a compliant model policy that employers can look to and implement in order to comply with this statute. Now, a couple of issues just to note there, the model policy is very helpful. There is a lot there that I think is useful and certainly consistent with the minimum standards that I mentioned earlier, but that model policy as with the law pertains only to sexual harassment. So another option for employers is to weave in those minimum standards that I mentioned earlier into their existing sexual harassment or antidiscrimination or anti-harassment policies because we all know that those laws not only prohibit sexual harassment but prohibit harassment based on any of those other bases. So another option would be to take the model policy or the minimum standards and incorporate those concepts into existing policies.

With regard to the complaint form, similar question arises, which is the complaint form at issue that was issued by the state really just pertains to sexual harassment, which is all that the law speaks to but one question for employers to consider is whether they want to use that complaint form and alter it to cover not just complaints of sexual harassment but other forms of harassment and discrimination.

Laura Fant: That's a great point. We want to make sure that everyone is being as comprehensive as possible when they craft these policies. So as Evandro mentioned, in addition to the policy requirements, the new law will now also require that all employees in New York State receive anti-harassment training on an annual basis. The deadline for completing the first annual training under the new law has now been extended to October 9, 2019. This was welcome news for a lot of employers as when the State first issued some draft guidance around these laws they initially indicated that the deadline for training would be January 1st, 2019, which would have left a very small window for employers to get that training done.

Luckily after receiving comments from the public the state took all this into account and did extend the training deadline to one year after the effective date of the law, or October 9, 2019. So this is great for employers, gives a little bit of breathing room to get your training policies in place.

Similar to the harassment policy minimum standard requirements, New York State has also issued minimum standard requirements for what should be included in employee training. These standards largely mirror those of the policy requirements such that they will require that training provide an explanation of what sexual harassment is under the applicable laws consistent with the guidance issued by the state. Employers will also need to provide examples of specific types of conduct that may constitute harassment under the law. The training will also have to cover various statutory provisions that speak to sexual harassment as well as remedies that are available to victims of harassment.

In addition to talking about an employers' internal processes for dealing with harassment, one of the interesting new points that will now have to be addressed during training is employees' rights of redress and forms for adjudicating complaints outside of the employers' workplace. So this includes being able to file a complaint with the Federal EEOC, with the New York State Division of Human Rights, and local agencies as well.

Finally, one point that will be important to include in your training is addressing conduct by supervisors. Supervisors do have a heightened responsibility under the law to be aware of and to report up the chain any harassing discriminatory behavior that they witness, are informed of or become aware of. So under the minimum standards for the training, employees will need to be informed about these additional obligations for supervisors.

Evandro Gigante: Practically speaking, are there rules around how this new training must be delivered?

Laura Fant: So the State does give employers a number of options as to how they can fulfill their training requirements. The training can be live in person, delivered by an in person trainer; or the training can be done via video or online training. However, it's important for employers to remember that if you go the route of video or online training the law does require that certain interactivity requirements be satisfied. These can be satisfied in a number of ways. So for example, if a training is web or video based, if it has questions throughout the training that employees have to select the right answer in order to move on or if employees have an option to submit questions at the end of the training that would be answered in a timely manner either by the training provider or by the employer themselves, then that will satisfy the interactivity requirements. For in person training, of course the ability to ask questions and receive answers during the training will also satisfy those requirements.

Evandro Gigante: With regard to who is required to get the training, is there any guidance about new employees receiving the training or perhaps temporary employees?

Laura Fant: Yes. So under the law all New York State employees regardless of the employer size and regardless of the employee's status will need to be trained. So this means in addition to conducting annual training for all your current employees, employers will also need to provide training for both new hires and temporary employees. For new hires, guidance previously issued by the state had indicated that they would need to be trained within 30 days of the start of hire. This has been expanded a little bit by the State. A little bit more flexibility has now been given to employers. So new employees now need to be trained as soon as possible after hire.

As for temporary employees, they're defined as people who work a portion of their time in New York State, even if they're based on another state and they're required to be trained as well. So what this effectively means is if you have an individual who may come to New York for one or two days a year or only for a very discrete meeting, they likely won't fall within the training requirement. However, individuals who are hired on a temporary or project basis or employees who may split their time between states and spend a significant portion of their time in New York, they will be covered by the training requirement.

Evandro Gigante: Thank you, Laura. And that comment about new employees is particularly important, of course, because employers will be liable for the conduct of their employees regardless of how long they've been working for them. So employers certainly have a strong incentive to provide that training as soon as they can.

Laura Fant: Absolutely right.

Evandro Gigante: Lastly, how can employers actually go about fulfilling this training obligation?

Laura Fant: So similar to what the State has done with regard to the mandatory policy, New York State has also issued some model documents that employers can use to implement the training requirement. So they include some model talking points that can be used for live training, model slides and case studies. In addition, as I mentioned, training can be live or online. So employers do have an option of seeking out live training, bringing someone in to meet with employees face to face or alternatively they can look to vendors to provide online video training. However, it is important to note that ultimately it's the employer who is going to be responsible for making sure that their training obligations have been fulfilled. So to the extent that employers are utilizing a vendor or an outside service to provide the training it is important to take a look at the materials, take a look at the module that's being used and make sure that it does satisfy the minimum requirements under the law.

Evandro Gigante: That's a very good point. Thank you, Laura. And thank you for joining us on the Proskauer Brief today. Stay tuned for more insights on the latest hot topics in labor and employment law and be sure to follow us on iTunes.

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