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New York State Revised Sexual Harassment Policy, Complaint Form, and Training Released

Approximately one-week before the deadline for employers to revise their sexual harassment policies, and after reviewing hundreds of comments from the public on its previously-released draft sexual harassment policy, complaint form, and training, New York State issued updated guidance, as well as a final model policy, complaint form, training, and revised Frequently Asked Questions (FAQs) on these topics. The revised FAQs also provide additional information on the statutory ban on mandatory confidentiality language in agreements settling sexual harassment claims. Below is a brief review of the current requirements applicable to all employers with individuals who work in New York.

1. Sexual Harassment Policy and Complaint Form

By October 9, 2018, all New York State employers must adopt and distribute to all employees a written sexual harassment policy, including an internal complaint form. According to the revised FAQs, the full complaint form does not need to be included in the policy, but employees must be told where the form can be found. The FAQs encourage, but do not require, employers to post their policy, distribute it to employees prior to their start date, and to obtain written acknowledgment of receipt of the policy from employees. Policies may be distributed electronically, but employees must be able to access the policy on a computer provided by the employer during work time and be able to print a copy for their records. According to the State's guidance, employers should provide employees with the policy in the language that is spoken by their employees. Although not clear, it appears that only one employee must have a primary language other than English for this requirement to apply. If, however, the State has not provided a template policy or training in the employee's language, the employer may provide the employee with the English version.

Employers are encouraged, but not required, to provide a copy of the policy to independent contractors, vendors, and consultants. The State's website also provides an optional poster that employers may "display[] in a highly visible place", which directs

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employees to the locations of the employer's complete policy and internal complaint form and informs employees who they may contact with questions or to make an internal complaint.

Employers are not required to adopt the Model Policy, provided that their policy meets or exceeds the following minimum standards:

- prohibits sexual harassment consistent with the State's guidance and provides examples of conduct that would constitute unlawful sexual harassment;

- includes information about the federal and state laws on sexual harassment and the remedies available to victims of sexual harassment, including a statement that there may be applicable local laws;

- includes a standard complaint form;

- includes a procedure for the timely and confidential investigation of complaints and ensures due process for all parties;

- informs employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

- clearly states 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 states that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The decision whether to adopt the State's Model Policy or to rely on an alternative formulation should be undertaken after discussion with counsel as there are some provisions in the Model Policy that arguably exceed the requirements of the statute.

2. Sexual Harassment Training

Although the sexual harassment training requirements are also effective October 9, 2018, the revised FAQs have extended the time within which employers must train their employees to October 9, 2019. Thereafter, employees must be trained at least once per year, either based on a calendar, anniversary year, or other date of the employer's choosing. Any employee, including minor employees, who works a portion of their time in New York State must be trained, even if they are based elsewhere. Supervisors and employees may be trained separately, though all employees must be

informed of the heightened requirements that apply to supervisory and managerial roles.

Employers are encouraged, but not required, to keep a copy of training records. Employers who have recently provided sexual harassment training this year may choose to provide only supplemental training, focusing on the requirements which were not included in their recent training. Additionally, if a newly hired employee can verify that he or she received training through another employer within the past year, the employer may choose to deem the training requirement satisfied. However, the revised FAQs indicates that employers should still provide training to new employees on business- and industry-specific nuances and processes, regardless of whether they previously received training.

Though the state considers live training to be "best practice", a live training is not specifically required; the training must, however, still be interactive. To be considered "interactive" the training should allow employees the opportunity to ask questions and receive a response in an immediate or timely manner, answer questions correctly at the end of the training, and/or provide mandatory feedback about the training and related materials. Watching a video or reading a document alone is insufficient. As with the policy, the guidance notes that the training should be provided in the language spoken by the employees.

The revised FAQs make clear that there is no minimum number of training hours required per year, as long as the training meets or exceeds the following standards:

- be interactive;
- include an explanation of sexual harassment consistent with guidance issued by the State;
- include examples of conduct that would constitute unlawful sexual harassment;
- provide information about the federal and state statutory provisions concerning sexual harassment and the remedies available to victims of sexual harassment;
- provide information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- include information addressing conduct by supervisors and any additional responsibilities that apply to supervisors.

The script for the model training can be found here. There is also a separate presentation containing "case study" examples of sexual harassment. The revised FAQs clarify that topics included in the model training that are not expressly listed

above are not mandatory, but rather are "strongly recommended". Employers choosing to make use of the model training should discuss with counsel which slides it may make sense to adopt and how to best revise the slides for the employer's business environment and operations. Employers who choose to utilize the model training are reminded that they must still customize the training to detail the employer's internal compliant process.

3. Non-Disclosure Agreements

Since July 11, 2018, New York State law has prohibited employers from inserting non-disclosure language in agreements resolving claims of sexual harassment unless doing so is the complainant's preference. Under the law, the complainant has 21 days from the date the confidentiality language is provided to them to consider the terms. If, after 21 days, the complainant prefers the language be included in the settlement agreement, then this preference must be memorialized in an agreement signed by all parties. The complainant, however, has 7 days following execution of such agreement to revoke his or her assent, and the agreement does not become effective until the revocation period has expired.

The revised FAQs provide some additional clarification. Specifically, the FAQs note that the process for obtaining an individual's consent to a confidentiality provision requires two separate documents: an agreement memorializing the preference of the complainant and whatever documents incorporate that condition as part of the overall resolution between the parties. The FAQs note that although the requirements of the law are similar to the consideration and revocation periods needed for a valid release of federal age discrimination claims, unlike age discrimination releases, the confidentiality consent cannot be combined with the standard representations and warranties in a settlement agreement that can otherwise be exercised on the spot. Rather, the FAQs seem to indicate that, unlike the 21-day review period under the federal age discrimination laws, which can be voluntarily curtailed by the employee, the 21-day review period for the confidentiality language cannot be shortened or curtailed in any way, and a separate assent to confidentiality must be entered into following the close of the 21-day consideration period.

Employers who are settling claims of sexual harassment and seeking confidentiality should therefore carefully review their settlement agreements, policies, and procedures, to ensure compliance with this updated guidance.

Next Steps

Employers should take immediate action to ensure that their anti-harassment and non-discrimination policies are compliant with the state requirements and are distributed to all employees by October 9, 2018. Employers should also begin reviewing and revising their equal employment opportunity and non-harassment trainings to make them sufficiently interactive and inclusive of the mandatory information required by the State. Employers in NYC with 15 or more employees, including interns, are reminded

that they have additional training obligations under City law, effective April 2019. Details about these requirements have not yet been provided by the City; however, the City has indicated that employers will have one year to comply with the City's training requirements. Therefore, employers should be mindful that their trainings may need to be further revised next year to account for additional city-law requirements, such a discussion of "bystander intervention."

If you have any questions about the above legislation, please contact Tina Grimshaw or any other attorney at the Firm at (212) 758-7600.