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New York State Issues Final Guidance on Sexual Harassment Prevention Policy and Training

On October 1, 2018, the New York State Department of Labor (the "DOL"), with the New York State Division of Human Rights, issued final guidance materials related to the State's enhanced protections against workplace sexual harassment.[1] The materials, which were revised after an open comment period that ended September 12, 2018, include final guidance setting forth the minimum standards for sexual harassment prevention policies and trainings, a model sexual harassment prevention policy, a model sexual harassment prevention training (along with a training script and case studies), a model complaint form, an employer toolkit containing instructions on how to comply with the new state measures, and an employee toolkit outlining protections under the new state measures.

Sexual Harassment Prevention Policy

The final DOL guidance retains the minimum standards of the sexual harassment prevention policy that were contained in the earlier draft guidance. By October 9, 2018, New York employers must provide to all employees a written sexual harassment prevention policy and make available a complaint form through which employees can report incidents of sexual harassment. At a minimum, the policy must: (1) prohibit sexual harassment consistent with the guidance documents issued by the DOL and provide examples of prohibited conduct; (2) clearly state that sexual harassment is a form of employee misconduct, as is supervisory or managerial personnel knowingly allowing such behavior to continue; (3) clearly state that sanctions will be imposed against individuals who engage in sexual harassment or supervisors who knowingly permit such harassment; (4) clearly state that retaliation against individuals who complain about, or who cooperate in an investigation or proceeding regarding, sexual harassment is prohibited and unlawful; (5) include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties; (6) include a complaint form; (7) include information about any applicable federal or state statutes concerning sexual harassment and any remedies those statutes provide; and (8) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints.

Employers may either adopt the DOL model policy or create their own policy that meets or exceeds the minimum standards. Policies must be provided to employees in writing or electronically; if the policy is

[1] For a more comprehensive discussion of the new state measures expanding protections against workplace sexual harassment, see Paul, Weiss Client Memorandum, "New Anti-Sexual Harassment Measures in New York State and New York City," (May 10, 2018), available here.

made available electronically, employees must be able to access the policy during work time on a computer provided by their employer and be able to print a copy for their records.

A revised list of frequently asked questions and corresponding answers provide several clarifications on the sexual harassment prevention policy:

- **Complaint form**. An employer's sexual harassment prevention policy does not have to include the full complaint form, but should be clear on where it can be found.
- **Investigative procedures**. An employer's sexual harassment prevention policy should detail any internal investigative procedures, which do not need to be identical to those in the DOL's model policy.
- **Written Acknowledgements**. Employers are not required to obtain from employees signed acknowledgements of having read the policy.
- **Policies in languages other than English**. While the draft guidance documents stated that employers should provide the policy in the language spoken by employees, the final guidance clarifies that employers may provide an English-language version of the policy if model materials are not available from the State in an employee's primary language. The finalized policy will be translated into Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish and Haitian-Creole, and made available on the DOL's website.
- **Contractors, subcontractors, vendors, and consultants**. Employers are not required to provide a copy of the policy to independent contractors, vendors, consultants, or any individual who is not an employee of the employer.

Sexual Harassment Prevention Training

The final DOL guidance also retains the minimum standards of the sexual harassment prevention training that were contained in the earlier draft guidance. Starting on October 9, 2018, employers must provide all employees with an interactive sexual harassment prevention training program, which, at a minimum, must: (1) include an explanation of sexual harassment consistent with the guidance documents issued by the DOL and provide examples of prohibited conduct; (2) include information about any applicable federal or state statutes concerning sexual harassment and any remedies those statutes provide; (3) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints; and (4) include information addressing conduct by supervisors and any additional responsibilities for supervisors.

In a departure from the draft materials, however, the final DOL guidance provides that all employees must be trained by October 9, 2019, instead of the original January 1, 2019 deadline. In addition, the final guidance eliminates the requirement that new employees receive training within thirty days of hire, although it encourages employers to train new hires as soon as possible.

Additional clarifications in the list of frequently asked questions and corresponding answers include:

- **Definition of "employee."** The guidance defines "employee" to include all workers, regardless of immigration status; exempt or non-exempt employees; part-time workers; seasonal workers; minors; and temporary workers. Only employees who work or will work in New York need to be trained, including, however, individuals based in other states who only spend a portion of their time working in New York.

- **Definition of "interactive" training**. The DOL guidance provides the following examples of interactive training that will satisfy the new state requirements: (1) web-based training with questions for the employee to answer and timely feedback to the employee on any questions they might have; (2) in-person or live training with the opportunity for the employee to ask questions; and (3) web-based or in-person trainings that provide employees with a feedback survey to be completed after the training. While in-person or live trainings are not required, the guidance makes clear that a training video or a document, with no feedback mechanism or interaction, will not be considered interactive and will therefore not satisfy the law's requirements.

- **Annual training**. Employees must be trained at least once per year. After the October 9, 2019 deadline, this date may be based on the calendar year, anniversary of each employee's start date, or any other date the employer chooses.

- **Trainings in languages other than English**. Like the sexual harassment prevention policy, the finalized training will be translated into Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish and Haitian-Creole, and made available on the DOL's website. Employers may provide an English-language version of the training if model materials are not available from the State in an employee's primary language.

- **Past trainings**. If an employee has already received training this year, but the training did not meet all of the new requirements, employers need only provide supplemental training to ensure all requirements are met. Employers may deem an employee who received compliant training from another employer within the past year to have satisfied the requirement, if that employee can verify completion.

- **Time for trainings and employee pay**. Any training time must be counted as regular work hours.

- **Third-party vendors**. Employers are permitted to use a third-party vendor or organization to deliver the training.

- **Managers and supervisors**. Employers must make managers and supervisors as well as all employees aware of the extra requirements for those in managerial or supervisory roles. The final guidance addresses the additional requirements, and employers may choose to provide additional or separate training to supervisors and managers.

Clarification on the Prohibition on Nondisclosure Agreements

As part of the state's enhanced protections against sexual harassment, nondisclosure agreements whose "factual foundation . . . involve[] sexual harassment" are prohibited.[2] Under the new legislation, employers are prohibited from including "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action" in any settlement, agreement or other resolution of any claim involving sexual harassment (whether or not a lawsuit has been brought), unless the complainant requests confidentiality.[3] The final guidance clarifies the three-step process in memorializing a complainant's preference for confidentiality:

- Any nondisclosure term or condition must be provided to all parties, and the complainant has 21 days from the date the term or condition is provided to consider it. As long as the statutorily prescribed process is followed, the law does not prohibit an employer from initiating the process by suggesting a nondisclosure term or condition.

- If the complainant continues to prefer confidentiality after the 21-day period, that preference must be memorialized in an agreement signed by all parties. This agreement will be separate from the settlement agreement itself.

- The complainant then has the option of revoking the agreement for a period of 7 days following its execution, and the agreement does not become effective or enforceable until the revocation period has expired. The 7-day revocation period does not start to run until the agreement memorializing the complainant's preference is executed.

- The 21-day period to consider a nondisclosure term or condition cannot be waived, shortened, or calculated to overlap with the 7-day revocation period that is also required under the new law.

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2 N.Y. Gen. Oblig. Law § 5-336, available here.

3 *Id.*

Key Takeaways for Employers Going Forward

Employers may want to consider reviewing their sexual harassment prevention policies and trainings, and consider updating or modifying them to ensure that they meet or exceed the minimum standards in the DOL's final guidance. In evaluating updates to their policies and trainings, employers in New York City may also want to consider the requirements of the recently enacted Stop Sexual Harassment in NYC Act (the "Act"), which requires employers with 15 or more employees to conduct annual sexual harassment prevention trainings for all employees employed in New York City.

The Act's requirements for trainings are more stringent than those required by the state measures—in addition to the DOL's mandatory minimum standards, the Act requires that trainings include information concerning bystander intervention. New York City employers may satisfy the Act's requirements by developing an online interactive training module, provided that employers inform all employees of any internal processes available to them to address sexual harassment complaints. Employers must also maintain records of all such trainings (including signed employee acknowledgements) for a period of at least three years. The Act's training requirements will take effect on April 1, 2019.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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