

Update on NYS Proposed Revisions to Model Sexual Harassment Prevention Policy

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Quick Recap

- In 2018, New York State began making a series of changes to its sexual harassment laws.
- Required employers to conduct annual sexual harassment prevention training for all employees.
 - Bond's Training Program:
<https://www.bsk.com/sexual-and-other-workplace-harassment-training/overview>
- Required employers to develop a sexual harassment prevention policy that met the requirements of the revised law.
 - State provided model policy in October 2018. (Last revised 2019)

Quick Recap

- In 2019, NY changed the standard of conduct that constitutes actionable harassment: “inferior terms, conditions or privileges of employment.”
 - Employers could argue that the offending conduct amounted to no more than a “petty slight” or “trivial inconvenience” in response to allegations of harassment.
- Previous standard: workplace harassment needed to rise to the level of conduct that was “severe or pervasive” to create an environment that was considered “hostile or abusive.”
 - This is still the federal standard for harassment.

Quick Recap

- NY Human Rights Law was expanded to include all employers, regardless of size.
- Statute of limitations for filing a complaint with the Division of Human Rights for sexual harassment increased from 1 year to 3 years.
 - Pending bill proposes to expand statute of limitations to 3 years for all types of harassment and discrimination

Revised Model Policy Proposed

- Labor Law 201-g requires the Department of Labor and Division of Human Rights and must revisit the model policy every 4 years.
- Proposed on January 12, 2023
 - <https://www.ny.gov/sites/default/files/2023-01/SexualHarassmentModelPolicy2022Proposed.pdf>
- Public comment period until February 11, 2023
 - <https://www.ny.gov/sites/default/files/2023-01/SexualHarassmentModelPolicy2022Proposed.pdf>

Revised Policy Changes

- Emphasis on gender diversity
 - “Discrimination based on sex stereotypes, gender expression and perceived identity are all forms of sexual harassment”
 - *Cisgender person*: someone whose gender aligns with the sex they were assigned at birth
 - *Non-binary person*: someone who does not identify exclusively as a man or a woman; they might identify as both, somewhere in between, or completely outside the gender binary
 - *Transgender person*: someone whose gender is different than the sex they were assigned at birth

Revised Policy Changes

- Emphasis on gender diversity
 - Includes the following as examples of sex stereotyping:
 - Remarks regarding an employee's gender expression, such as wearing a garment typically associated with a different gender identity; or
 - Asking employees to take on traditionally gendered roles, such as asking a woman to serve meeting refreshments when it is not part of, or appropriate to, her job duties
 - Intentional misuse of an individual's preferred pronouns; or
 - Creating different expectations for individuals based on their perceived identities:
 - Dress codes that place more emphasis on women's attire
 - Leaving parents/caregivers out of meetings

Revised Policy Changes

- New examples of retaliatory conduct:
 - Demotion, termination, denying accommodations, reduced hours, or the assignment of less desirable shifts;
 - Publicly releasing personnel files;
 - Refusing to provide a reference or providing an unwarranted negative reference;
 - Disparaging someone on social media
 - Labeling an employee as “difficult” and excluding them from projects to avoid “drama”;
 - Undermining an individual’s immigration status; or
 - Reducing work responsibilities, passing over for a promotion, or moving an individual’s desk to a less desirable office location.

Revised Policy Changes

- Examples of additional harassing conduct have been added:
 - Sexual advances/pressure placed on a service industry employee by customers or clients, especially those industries where hospitality and tips are essential to the customer/employee relationship
 - Questions/comments about a person's "romantic history"
 - Repeated requests for dates or romantic gestures, including gift-giving
- "Any employee who believes they have experienced sexual harassment, even if it does not appear on this list, should feel encouraged to report it."

Revised Policy Changes

- New Section on Bystander Intervention
 - Encourages bystanders to report harassment
 - Mandates that supervisors who are bystanders report harassment
 - Provides 5 “standard methods” for intervention:
 - Interrupt and distract
 - Ask a third-party to interrupt and distract
 - Record or take notes of the harassment
 - Check in with the person who has been harassed
 - Confront the harasser and call out the behavior as inappropriate (only if the bystander feels safe to do so)

Revised Policy Changes

- Renewed emphasis on impact over intent.
 - “The intent of the behavior, for example, making a joke, does not neutralize a harassment claim.”
- Clarifies that not intending to harass is not a defense, and the impact of the behavior on a person is what counts.
- *This is an important point to emphasize to employees when discussing the effect their actions could have.*

Revised Policy Changes

- New references to remote work
 - Any behaviors that are illegal in the workplace can also be found to be illegal when one or more persons are working remotely.
 - “Harassment can happen on virtual meeting platforms, in messaging apps, and after working hours between personal cell phones.”
 - Posters or other materials in the background of virtual platforms can be harassing

Revised Policy Changes

- New sexual harassment prevention hotline
 - 1(800) HARASS-3
 - “Provide you with a referral to a volunteer attorney experienced in sexual harassment matters who can provide you with limited free assistance and counsel over the phone.”
 - Hotline is run by the Division of Human Rights and operates during the Division’s business hours.
 - Note: Information about the hotline should already be in your policies, because it was part of a law that was passed in the spring of 2022.
- Policy also references the online complaint process at the Division.

Revised Policy Changes

- Emphasis on other types of discrimination and the ways in which they interact with sexual harassment.
 - “The New York State Human Rights law protects against discrimination in several protected classes including sex, sexual orientation, gender identity or expression, age, race, creed, color, national origin, military status, disability, pre-disposing genetic characteristics, familial status, marital status, criminal history, or domestic violence survivor status.”
 - “The prevention policies outlined above should be considered applicable to all protected classes.”

Revised Policy Changes

- Emphasis on other types of discrimination and the ways in which they interact with sexual harassment.
 - Our different identities impact our understanding of the world and how others perceive us. For example, an individual's race, ability, or immigration status may impact their experience with gender discrimination in the workplace.
 - While this policy is focused on sexual harassment and gender discrimination, the methods for reporting and investigating discrimination based on other protected identities are the same.

Revised Policy Changes

- Emphasis on other types of discrimination and the ways in which they interact with sexual harassment.
 - “Individuals bring personal history with them to the workplace that might impact how they interact with certain behavior.”
 - “It is especially important for all employees to be aware of how words or actions might impact someone with a different experience than their own in the interest of creating a safe and equitable workplace.”

Revised Policy Changes

- Emphasis on other types of discrimination and the ways in which they interact with sexual harassment.
 - Placing different demands or expectations on black women employees than white women employees can be both racial and gender discrimination;
 - An individual's immigration status may lead to perceptions of vulnerability and increased concerns around illegal retaliation for reporting sexual harassment; or
 - Past experiences as a survivor of domestic or sexual violence may lead an individual to feel re-traumatized by someone's behaviors in the workplace.

Revised Policy Changes

- Supervisors have a “special responsibility:”
 - “Leadership matters”
 - Managers and supervisors should not be passive and wait for an employee to make a claim of harassment.
 - Supervisors must be mindful: “being identified as a possible victim of harassment and questioned about harassment and discrimination can be intimidating, uncomfortable and re-traumatizing for individuals.”
 - “Supervisors and managers must accommodate the needs of individuals who have experienced harassment to ensure the workplace is safe, supportive, and free from retaliation for them during and after any investigation.”

Revised Policy Changes

- Emphasis on victim trauma continues on policy section regarding the investigation process:
 - The Company “recognizes that participating in a harassment investigation can be uncomfortable and has the potential to retraumatize an employee.”
 - Therefore, “those receiving claims and leading investigations will handle complaints and questions with sensitivity toward those participating.”
- This is a shift in tone that may change the way employers conduct an investigation.

Revised Policy Changes

- What should employers do?
- Employers are “encouraged to tailor this policy to their individual needs,” but also warns that “no section in this policy should be omitted.”
- Public comment period closes on February 11, 2023.

Legal Developments Every Employer Needs to Know

- For additional in-depth analysis, tune into our Tuesday webinar series: <https://www.bsk.com/news-events-videos/update-and-discussion-on-legal-and-practical-issues>
- Also, you can subscribe to our employment law blog at <https://www.bsk.com/new-york-labor-and-employment-law-report>



Questions?

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