

# Bond

Workplace Harassment  
Prevention: A Necessity  
Now More Than Ever

## CNY SHRM

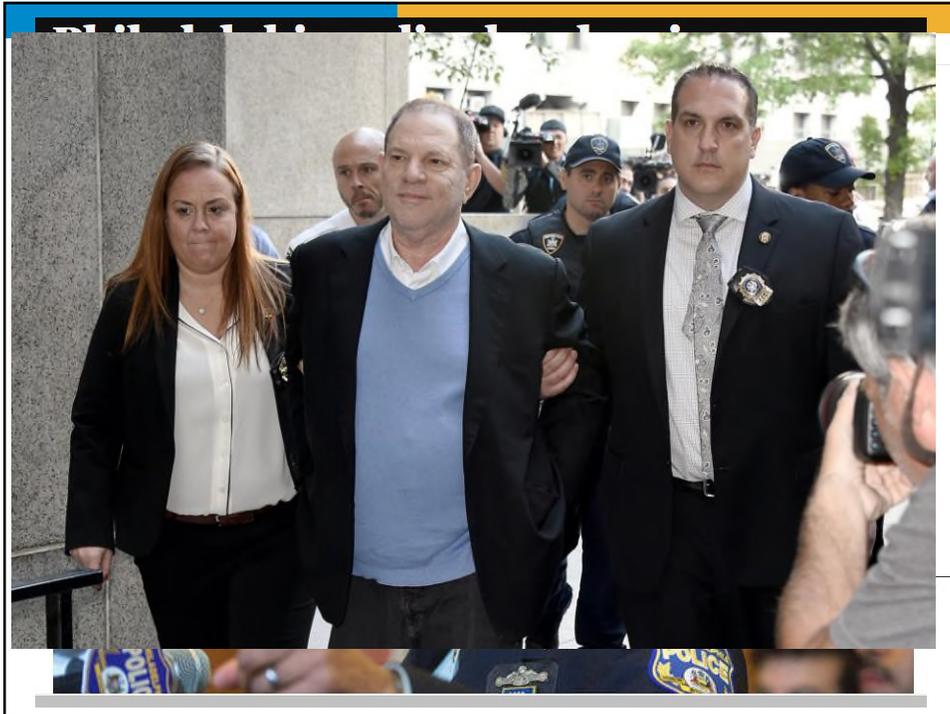
**September 17, 2019**

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## THE "WEINSTEIN" EFFECT





## I thought New York already passed new legislation??!???

- 2018 “Sexual Harassment” Amendments
  - Mandatory Policy & Training
  - Prohibition on Confidentiality Agreements
  - Prohibition on Arbitration Agreements
  - Protection of Non-Employees in the Workplace
  - Other New Requirements

***These requirements all focused on sexual harassment!***

## Refresher: Sexual Harassment Policy

- Employers required to adopt and distribute a new written sexual harassment prevention policy
- Must “equal or exceed” minimum standards set by New York State
- Final “Model” policy published on October 1, 2018
- **Policy should already be in place (Deadline: October 9, 2018)**



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## Refresher: Sexual Harassment Minimum Policy Standards

- Sexual harassment prevention policy must include:
  - Prohibition of sexual harassment consistent with guidance issued by NYDOL and NYDHR
  - Examples of prohibited conduct that constitutes unlawful sexual harassment
  - Information about statutory provisions concerning sexual harassment, remedies available to victims, and a statement that there may be applicable local laws
  - Procedure for timely and confidential investigation of complaints that “ensures due process for all parties”



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## Refresher: Sexual Harassment Minimum Policy Standards (cont.)

- Sexual harassment prevention policy must include:
  - Information regarding employees' rights of redress and all available forums for adjudicating harassment complaints
  - Harassment complaint form
    - Minimum Standards: "The policy must . . . include a complaint form . . ."
    - FAQs: "Q6 Does the complaint form need to be included, in full, in the policy?"
    - A6 No. Employers should, however, be clear about where the form may be found, for example, on a company's internal website."



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## Refresher: Sexual Harassment Minimum Policy Standards (cont.)

- Sexual harassment prevention policy must include:
  - Statement that sexual harassment constitutes employee misconduct and that sanctions may be imposed against harassers and against supervisors/managers who knowingly allow such behavior to continue
  - Statement that it is unlawful to retaliate against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment



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## Refresher: Sexual Harassment Training

- Employers are required to provide annual harassment prevention training
  - Remember: training time is generally compensable
- According to NYS:
  - Employees must receive training **prior to October 9, 2019**, and once per year thereafter
    - Calendar year, each employee’s anniversary date, or any other date selected by employer
  - It “encourages” training for new employees “as soon as possible”



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## Refresher: Minimum Standards for Sexual Harassment Training

- Must be interactive – for example:
  - Web-based with questions – employee must select correct answers to complete training
  - Web-based with option to submit question and receive immediately or timely answer
  - Live training (in person, by phone, by video) where presenter asks employees questions or vice versa
  - Web-based or in-person training with feedback survey for employees to complete
- **Watching a video or reading a document is not interactive**



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## Refresher: Minimum Standards for Sexual Harassment Training (cont.)

- Must include:
  - Explanation of sexual harassment consistent with guidance by NYDOL and NYDHR
  - Examples of prohibited conduct
  - Information about federal and state statutory provisions concerning sexual harassment
    - Remedies available to victims
    - Rights of redress
    - All available forums for adjudicating complaints
  - Information addressing supervisor conduct and responsibilities



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## Refresher: Best Practices for Sexual Harassment Training

- Train supervisors and non-supervisors separately
- Live training is best but not always practicable
- Incorporate your organization's harassment policy and procedures into the training materials
- Keep it engaging and fresh – the law is dynamic
- Use examples appropriate for your workplace
- Set the bar: respectful workplace 100% of the time



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## Refresher: Limited Nondisclosure Provisions

- Employers cannot require nondisclosure provision to resolve sexual harassment claims
  - Effective July 11, 2018
- May only include if complainant's preference
- Set 3-step process for documenting preference
  - Full 21 days to consider
  - Written agreement reflecting preference
  - 7 days to revoke
- Must have two separate written documents



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## Refresher: Claims By Non-Employees

- Employers may be held liable to a non-employees for sexual harassment where:
  - Non-employee is contractor, subcontractor, consultant or other person providing services pursuant to a contract (or any employees of the foregoing),
  - Employer (or its agents/supervisors) knew or should have known of harassment, and
  - Employer failed to take immediate and appropriate corrective action
- Effective April 12, 2018



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## So there is *more*, new legislation???

- Highlights of 2019 New York Amendments
  - Easier Burden to Claim Unlawful Harassment
    - New Legal Standard
    - Lesser Proof Required
  - Limitations on Employer Defenses
  - Expanded Protection for Non-Employees
  - Broader Penalties & Remedies

**Almost all of the new requirements focus on *discrimination and harassment generally, not just sexual harassment!***



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## So there is *more*, new legislation???

- 2019 “Human Rights” Amendment “Highlights” (Cont.)
  - Broadens Prohibition on Confidentiality Agreements
  - Expands Prohibition on Arbitration Agreements
  - New Training and Policy-Related Requirements (Sexual Harassment)

**Almost all of the new requirements focus on *discrimination and harassment generally, not just sexual harassment!***



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## Easier Burden to Claim Unlawful Harassment Under HRL

- **Old:** Conduct must be “severe or pervasive”
  - Still applicable under federal law, e.g., Title VII
- **New:** Conduct that “subjects an individual to inferior terms, conditions, or privileges of employment”

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## Easier Burden to Claim Unlawful Harassment Under HRL

- No “comparator” evidence required
- Interpretation under federal law is not controlling
- Exceptions from liability construed *narrowly*
- Remedies for liability to be construed *broadly*

*Changes effective October 11, 2019*

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## Limitations on Employer Defenses Under the HRL

- Old: Failure to complain = Legal defense
- Third Circuit Court of Appeals
  - *[T]here may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.*
- New: No complaint = Claim still viable



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## Limitations on Employer Defenses Under the HRL

- Remaining *respondeat superior* defense?
  - Employer not liable for an employee's discriminatory act unless it became a party by "encouraging, condoning, or approving it."
- Limited Affirmative Defense
  - "Petty Slight" and "Trivial Inconveniences" Not Actionable
  - May be a small comfort!

*Changes effective October 11, 2019*



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## New Standard: “Trivial” or “Petty”

- Where is the new “line” for unlawful harassment under the HRL?
- NYC HRL uses a comparable standard
- Lawful or unlawful?
  - *Crude anecdote about sex life and occasional reference to employee as voluptuous...*
  - *All women are b----es, except my mother...*
  - *Complimenting female employee’s hair and boots, lightly squeezing her thigh for a few seconds while seated together*



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## Expanded Protection for Non-Employees

- **New:** Covered non-employees in the workplace protected against any and all forms of discrimination and harassment (**not** just sexual harassment)
- **Test:** Did employer know – or should it have known – non-employee was subject to discriminatory practice, but failed to take immediate and appropriate corrective action

*Changes effective February 8, 2020*



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## Non-Disclosure / Confidentiality of Claims

- **New:** Broadened ban on confidentiality clauses/agreements addressing any and all discrimination claims (**not** just sexual harassment)
  - Can only be used if “complainant’s preference” and following a specific legal process
- **New:** Terms must be written in “plain English” and (if applicable) in the “primary language of the complainant”



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## Non-Disclosure / Confidentiality of Claims

- **New:** Confidentiality provision cannot limit:
  - Subpoena-related activity, e.g., initiating, testifying, or complying with subpoena
  - Cooperating or participating with investigative agency
  - Providing information relating to UI, Medicaid, or other public benefit claims
  - Disclosing factual information relating to future claims, unless also advising that the party can speak with law enforcement, EEOC, SDHR, and other entities (effective 1/1/2020)

*Changes effective October 11, 2019*



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## Mandatory Arbitration Clauses

- New: Broadened ban on mandatory arbitration clauses/agreements addressing any and all discrimination claims (not just sexual harassment)
- But what about *Latif v. Morgan Stanley* (SDNY June 26, 2019)????

*Changes effective October 11, 2019*



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## Mandatory Sexual Harassment Training & Policy

- New: Policy must be provided “at the time of hiring” and at every annual training program
- New: Policy and “information presented” at the sexual harassment training must be provided in English and in other “primary language” of employees (as specified by the state)

*Changes effective immediately*



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## Other Significant New Changes

- Employers of all sizes are covered under the HRL
- Mandates the award of attorneys fees to a successful party (really, a successful claimant)
  - Unless you are a successful defendant, in which case the underlying claim must be proved “frivolous”
- Claimants will have 3 years to file with SDHR (instead of 1 year)
- Punitive damages cannot be awarded against state or local departments, agencies, or boards of commission (but, do still apply to private employers!)

*Various effective dates*



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## Practical Recommendations

- 1) Revise mandatory sexual harassment training program and policy, as needed
- 2) Obtain translations of sexual harassment training and policy materials, as necessary
- 3) Review existing personnel agreements to address confidentiality and arbitration issues, including employment, severance, and non-compete agreements



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## Practical Recommendations (Cont.)

- 4) Educate leadership about significant changes, especially new lower threshold for harassment claims
- 5) Create or review investigatory procedures and plans
  - Now an even higher premium on promptly addressing complaints!
  - Who will investigate?
  - Who else will be involved?
  - What will be done?
  - How quickly will it be done?



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## Practical Recommendations (Cont.)

- 6) Use training to raise the “Emotional IQ” and enhance empathy of staff and especially supervisors
- 7) Carefully document all employee complaints – remember the standard is now just something more than “trivial” or “petty”!
- 8) Keep spreading the word: Be respectful 100% of the time!!!



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**Sexual and Other Workplace Harassment Training**  
Web-Based Interactive Training Program Offered by  
 **BOND**  
Compliant with all New York State and New York City regulations on sexual harassment training.



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Questions???



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