

NYS Revised 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)

Revised Model Policy Released

- Labor Law 201-g requires the Department of Labor and Division of Human Rights to revisit the model policy every 4 years.
 - Proposed on January 12, 2023
 - Public comment period until February 11, 2023
 - **Final released on April 11, 2023**
 - Revised model training with video, script and handout also released on April 11, 2023

What's Next

- Underlying law did not change
- No deadline to change current policy
- Model reveals areas of state's interest and focus
- Best practice is to adopt or incorporate language and elements of state's model*
 - Employers are “encouraged to tailor this policy to their individual needs,” but also warns that “no section in this policy should be omitted.”
- Bond will enhance its training program to incorporate state's new areas of focus

*With perhaps a few exceptions

Proposed (February) v. Final (April)

- Virtually identical
- One change only:
 - Expanded discussion of EEOC process, to include the EEOC's role in conciliation of complaints

Model Policy's New & Enhanced Areas of Focus

1. Intersection with Other Protected Classes

- Acknowledges harassment can occur based on other protected classes.
 - “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.”
 - “The prevention policies outlined above should be considered applicable to all protected classes.”
- Nevertheless, using this policy as your *only* policy on harassment & discrimination is not recommended.

1. Intersection with Other Protected Classes

- Acknowledges that membership in other protected classes may affect how gender-based conduct impacts a person
 - “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.”

1. Intersection with Other Protected Classes

- “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.”

1. Intersection with Other Protected Categories

- Examples:
 - “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.”

2. Gender Diversity

- Emphasis on gender diversity
 - “Understanding gender diversity is essential to recognizing sexual harassment because discrimination based on sex stereotypes, gender expression and perceived identity are all forms of sexual harassment”
 - Discusses the gender spectrum, providing definitions:
 - *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

2. 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

3. 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)

4. Remote Work Environments

- 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

5. NYS's Elevated Standard & Importance of Impact

- Elaborates on NYS standard adopted in 2019
 - “Generally, any behavior in which an employee or covered individual is treated worse because of their gender (perceived or actual), sexual orientation, or gender expression is considered a violation of [Employer’s] policy.”
- 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.*

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 - *This is an important point to emphasize to employees when discussing the effect their actions could have (particularly when employee’s use the defense of “I was just joking.”*
- “Impact” is a major theme throughout the policy, and the word is used multiple times.

6. Additional Practical Examples Added

- Retaliation:
 - 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.*

6. Additional Practical Examples Added

- “Sexual advances/pressure placed on a service industry employees by customers or clients, especially in those industries where hospitality and tips are essential to the customer/employee relationship”
- “Repeated requests for dates or romantic gestures, including gift-giving.”
- Questions/comments about romantic history

7. External Remedies Emphasized

- Options to externally file a complaint with a government agency more prominently placed (page 1, goals)
- “An employee or covered individual who prefers not to report harassment to their manager or employer may instead report harassment to the NYSDHR and/or the US EEOC. Complaints may be made to both the employer and a government agency.

7. External Remedies Emphasized

- 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.

8. “Special Responsibility” of Supervisors & Leaders

- 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.”

9. Victim Trauma

- 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.”
 - “Supervisors and managers must be mindful of the impact that harassment and a subsequent investigation has on victims.”
 - 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 investigations and raises a question of what to do if an individual claims that they are too traumatized to be interviewed.

10. Other Interesting Points

- Lengthy statement on Purpose and Goals
 - Intersectional focus; emphasis on external remedies
- Lists types of non-employees also covered

“Also included are persons providing equipment repair, cleaning services, or any other services through a contract with [Employer Name].”
- Explicit statement that one need not use the form to report
- Policy can be distributed via email (though it should also be in the handbook)

Training

Revised Model Training Also Released

- Although the State released a proposed revised model policy in January, it did not release a proposed revised model training.
 - *Left an open question as to whether the training would be revised.*
- However, the training was released on April 11, 2023, at the same time as the final revised model policy.
- The revised training largely mirrors the revised policy, but only addresses sexual harassment.

Revised Model Training Also Released

- The former training was two videos
 - 19 minutes of instruction
 - 22 minutes of case studies
- The revised training is a 54-minute video that has both instruction and case studies.
- The accompanying script and PowerPoint slides are included in the training materials.

Revised Model Training

- There is a requirement that training be “interactive” in order to fulfill the State’s requirements.
 - Having employees watch the State’s video is insufficient
- The State released a form for employees to answer true/false questions relating to the case studies
 - When completed by attendees and submitted to the employer, this fulfills the interactive requirement
- Bond will be updating its model training.

Questions?

Legal Developments Every Employer Needs to Know

- Tune into our Tuesday webinar series: <https://www.bsk.com/news-events-videos/update-and-discussion-on-legal-and-practical-issues>
- Subscribe to our employment law blog at <https://www.bsk.com/new-york-labor-and-employment-law-report>



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