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# New York's new sexual harassment laws: A compliance checklist

**By Devjani H. Mishra, Esq., *Littler Mendelson***

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In early 2018, New York state and New York City stepped to the forefront of the post-#MeToo reform agenda, as each adopted sweeping legislation targeting workplace sexual harassment.

The new overlapping laws reflect a three-pronged effort to combat harassment by educating individuals about their legal rights, emphasizing the responsibility of employers to deter and investigate potential harassment, and strengthening procedural and legal protections for those who experience unlawful harassment.

This article reviews the new requirements and discusses recommended practices for integrating compliance with the new laws into employers' existing programs.

## POLICY AND POSTING REQUIREMENTS

Effective Oct. 9, companies must distribute a written anti-sexual harassment policy to all New York-based employees.[1] Many employers already have such policies, since establishing an effective anti-discrimination program can provide an affirmative defense in discrimination lawsuits.

However, employers must revise their policies to make sure that they incorporate all the new requirements.

Written policies now must do all the following:

- Prohibit sexual harassment and provide examples of prohibited conduct.
- Reference applicable laws and describe the legal remedies available to victims of sexual harassment.
- Include a complaint form that can be used to report possible harassment.
- Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties.
- Describe employees' rights of redress and all administrative and judicial forums that accept sexual harassment complaints.
- State that sexual harassment constitutes misconduct, and that both individuals who commit harassment and supervisors who knowingly allow harassment to continue will be disciplined.
- State that retaliation against those who complain or participate in a proceeding involving alleged sexual harassment is unlawful.

Typically, written policies have prohibited harassment and retaliation, included a complaint procedure, and described the responsibility of managers to address policy violations. However, New York employees are now legally entitled to certain information about external complaint mechanisms, including the right to file charges with administrative agencies or in court and the availability of damages and other relief. This is a significant change.

Further (and uniquely), New York requires employers to provide a sample complaint form for reporting possible harassment internally.

Employees are now legally entitled to certain information about external complaint mechanisms, including the right to file charges with administrative agencies or in court.

The use of this form is not mandatory; the idea is to expand avenues for making complaints, but not to deter anyone who may be uncomfortable submitting a complaint in writing. In addition, the employer's internal complaint procedure must ensure due process for both the complainant and the accused.

While "due process" has not been defined, it is assumed to include allowing all parties to submit information that will be considered in an investigation.

In October, the state published a model anti-harassment policy and complaint form.[2] Employers should study this model carefully before adopting it, though, because portions of it exceed the legislative requirements and may be difficult to implement.

For one thing, the model includes a lengthy investigation protocol, including steps that may not be universally appropriate. For example, a complaint of verbal harassment may not actually require extensive document review. Moreover, the model protocol may not be feasible for smaller employers or those that do not have human resources personnel.

Distributing the model policy could disadvantage an employer in future litigation if it has not been able to follow all the promised internal steps. Similarly, the model devotes over two pages to external complaint processes, sometimes veering into legal advice that employers should not be giving their employees.

While employers should ensure that their revised policies have the required elements — including identifying appropriate external resources — they should also ensure that they do not inadvertently commit to practices they are not prepared to implement.

New York City has not adopted its own policy requirements, but now requires employers to post a "Stop Sexual Harassment Act" notice in English and Spanish, and to distribute the same information in fact sheet form to new hires.[3]

Notably, the fact sheet covers many elements employers must add to policies under state law, and can help fill the gap while revisions are pending. Ultimately, employers must distribute their policies to all New York-based employees in writing or electronically.

Employers are encouraged, though not required, to translate their policies into the languages commonly spoken by their employees.

## MANDATORY ANNUAL HARASSMENT PREVENTION TRAINING

Effective Oct. 9, employers must implement annual sexual harassment prevention training for all New York-based employees, covering the same material as the required policy. The training must be "interactive," meaning that it asks participants questions or invites feedback, even if it is recorded or replayed training. Training may be conducted in person, by audio, video or web, and there is no specified duration.

All employees must be trained by Oct. 9, 2019. The state urges employers to train new hires "as soon as possible," reasoning that "employers may be liable for the actions of employees immediately upon hire."[5]

To facilitate compliance, the state has issued extensive model training materials and videos, and it continues to release additional materials in languages other than English.[6]

The city's training requirement takes effect April 1, 2019.[7] It essentially repeats the state's mandate, except that city-based employees must also be trained and given resources on bystander intervention: Those who witness workplace harassment should be encouraged to disrupt and stop the harassment.

Research supports the efficacy of bystander training, and many employers may wish to roll it out statewide but are awaiting the city's guidance on this topic.

The current legislative focus on sexual harassment is understandable, and additional training may well be part of the solution. However, employers must consider how to integrate the new requirements into their existing anti-discrimination programs.

Addressing sexual harassment separately from other discrimination or workplace concerns not only creates implementation challenges for HR (and others who must administer multiple policies), it may also send the wrong message to employees.

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A distinct enforcement scheme may reinforce the very attitudes that the new laws intend to challenge by implying that those who experience sexual harassment need greater protection than others.

Further, providing the same training program every year on a single subject may create disengagement from the content, defeating the educational goals of the new statutes.

Moreover, as states and localities continue to add new mandates, multistate employers must decide whether maintaining separate local policies and trainings is compatible with promoting a common workplace culture.

Where resources permit, businesses should take this opportunity to holistically review their existing policies, workforce needs and organizational goals, and develop policies and training programs that not only prohibit unlawful conduct but actively promote a respectful workplace.

## EXPANDED COVERAGE AND PROCEDURAL PROTECTIONS

Gov. Andrew Cuomo has described the new state law as reflecting "the strongest and most comprehensive anti-sexual harassment protections in the nation." This may be a fair statement, as state and city laws now reach employers of all sizes[8] with any personnel located in New York, and cover non-employees as well.

Both the state and city require training for not only employees based in New York, but for those who work "a portion of their time in New York state, even if they are based in another state."[9]

New York City clarifies "a portion of the time," requiring training for "employees who work more than 80 hours in a calendar year and for at least 90 days" for a single employer.[10] Employers may consider the city's guidance when deciding whether an employee's incidental travel or short-term work in the state is enough to require training.

Moreover, state law now provides that an employer may be liable when it knows or should know that non-employees providing services in the workplace, such as contractors, subcontractors, consultants and vendors, are being sexually harassed and fails to take immediate and appropriate corrective action.[11]

Wherever possible, non-employees should receive policies and training from their employer of record (e.g., the temporary staffing agency or consulting services provider), and the end user of the services should include this condition in its contingent workforce agreements.

However, where there is no third-party employer of record, as with a self-employed contractor, the company may need to train that non-employee. Indeed, the city states that an employer must train independent contractors who meet the 80 hours/90 days rule, unless they "have already received the mandated annual training elsewhere."[12]

While employers are not required to distribute policies to non-employees, or to train individuals who have another employer of record, employers nonetheless should include language in their policies prohibiting harassment of or by non-employees.

Employers also should consider telling non-employees at the start of an assignment how to submit workplace harassment complaints. In addition, they should think about how they will work with third-party employers to ensure that non-employee complaints are properly investigated and addressed.

## ARBITRATION CLAUSES AND SETTLEMENT AGREEMENTS

The new state law also addresses both mandatory arbitration clauses and settlement agreements. It prohibits mandatory arbitration of sexual harassment claims, except where there is a conflict with a collective bargaining agreement or an inconsistency with federal law.[13]

Given this exception, most expect this provision to be preempted by the Federal Arbitration Act, particularly following the U.S. Supreme Court's May 2018 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the most recent in a series of pro-arbitration decisions.

Thus, the law's arbitration provision is unlikely to have much impact. Employers that use arbitration programs should make sure to reference them in the section of their policies addressing complaint mechanisms.

In contrast, the new law will significantly affect the settlement of sexual harassment claims, given that the state is actively discouraging the use of non-disclosure agreements in these cases. Specifically, parties may not enter into an NDA about the underlying facts and circumstances of a sexual harassment claim unless the NDA is the expressed "preference" of the complainant.[14]

To effectuate this, the complainant must be provided a non-waivable 21-day consideration period and a seven-day revocation period, and must specifically affirm a preference for confidentiality only after the 21-day period has expired.

Further, the state has taken the position (in an FAQ, but not yet in formal regulation) that the parties must execute two separate documents to memorialize the NDA, even though confidentiality is usually a material term and the use of multiple documents increases the risk of confusion and error.[15]

Employers are strongly advised to revise their standard agreements, present all settlement terms to a complainant simultaneously, including an NDA, and not accept a complainant's signature on any piece of the agreement until the full waiting period has passed.

## CONCLUSION

While the federal response to the #MeToo movement has been limited, New York state and New York City have significantly expanded worker protections to combat workplace harassment.

Companies with New York employees must adopt or revise policies and expand employee training to meet the new requirements. They must also consider how to build their capacity to handle an anticipated increase in claims.

Further, companies need to think carefully about the implications of the new laws, which expand protection for non-employees and make it more difficult to secure confidential settlements. More generally, employers should evaluate how to integrate these reforms into existing compliance programs to promote a respectful workplace culture.

## NOTES

[1] N.Y. Lab. Law § 201-g.

[2] New York state's model policy is *available at* https://on.ny.gov/2PGrQmS.

[3] The New York City Notices and Fact Sheet are *available at* https://on.nyc.gov/2obawap.

[4] N.Y. Lab. Law § 201-g.

[5] *See Combatting Sexual Harassment: Frequently Asked Questions For Employers*, Training Q3, at https://on.ny.gov/2Cas2FB.

[6] The state's training materials are *available at* https://on.ny.gov/2OtyufC.

[7] N.Y.C. Admin. Code § 8-107(30)(a).

[8] N.Y. Exec. Law § 292(5); N.Y.C. Admin. Code § 8-102(5).

[9] *Combatting Sexual Harassment: Frequently Asked Questions For Employers*, Training Q7.

[10] *See Stop Sexual Harassment in NYC Act: Frequently Asked Questions*, at https://on.nyc.gov/2R83nnl.

[11] N.Y. Exec. Law, § 296-d.

[12] *See Stop Sexual Harassment in NYC Act: Frequently Asked Questions*. Independent contractors also count toward the city's 15-employee threshold for providing anti-harassment training, but this threshold is mooted by the state's universal requirement.

[13] N.Y. C.P.L.R. § 7515.

[14] N.Y. C.P.L.R. § 5003-b; N.Y. Gen. Oblig. Law §5-336.

[15] *See Combatting Sexual Harassment: Frequently Asked Questions For Employers*, Nondisclosure Agreements Q7.

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## ABOUT THE AUTHOR

**Devjani H. Mishra** is a shareholder in **Littler Mendelson**'s New York office and has more than 20 years of employment law experience, both in the law firm setting and as in-house counsel. She advises employers of all sizes and works closely with senior management and human resources personnel to establish corporate compliance, ethics and training programs, and codes of conduct.

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