New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 55
TUESDAY, SEPTEMBER 17, 2019

Outside Counsel

5 Best Practices For NY Employers To Remain Compliant With Harassment Laws

By **Stacey A. Usiak**

And **Andrew P. Yacyshyn**

The multi-pronged requirements of the recent New York State and New York City anti-harassment laws have had the effect of creating an awareness of and a sensitivity to the issue of sexual harassment that did not previously exist in most workplaces. The well-publicized Oct. 9, 2019 deadline for completion of initial employee anti-sexual harassment training under NYS law has led many clients to reach out to their lawyers for guidance and assistance with compliance.

Although most New York business owners and human resource professionals understand that they must comply with the new requirements, they may not truly understand the full scope of their obligations and the potential ramifications of failing to comply. Among other implications, the new laws have resulted or will result in: the extension of the statute of limitations for filing a claim of sexual harassment with the New York State Division of Human Rights from one to three years, a reduction in the standard of proof required for harassment claims from "severe or pervasive" to a mere showing that the employee has been subjected to "inferior terms, conditions or privileges of employment," and an elimination of the Faragher-Ellerth affirmative defense that had been available to employers who could demonstrate both that: (1) they had attempted to prevent harassment; and (2) the complaining employee unreasonably failed to take advantage of the employer's avenue of redress (such as an internal complaint procedure). New York State will now be in closer alignment with the New York City Human Rights Law in allowing for an affirmative defense if an employer can show that the allegedly harassing conduct "does not rise above the level of what a reasonable victim of discrimination…would consider petty slights or trivial inconveniences." In addition to existing remedies, including attorney fees, successful gender discrimination complainants are now able to recover punitive damages, which were previously not available under New York State law.

> Compliance with the new laws aimed at combatting workplace sexual harassment is not as simple as sending employees to a training.

The stakes are higher than ever before for employers who fail to keep harassment out of their workplaces. The actions by New York State and New York City on this front are part of a trend that will likely continue throughout other jurisdictions. Compliance with the new laws aimed at combatting workplace sexual harassment is not as simple as sending employees to a training. Below are five best practices for employers seeking to prevent sexual harassment claims in their workplaces.

STACEY A. USIAK *is a partner and* ANDREW P. YACYSHYN *is an associate in the employment law practice of Tannenbaum Helpern Syracuse & Hirschtritt.*

(1) Written Policy

While most employers have long had in place equal employment opportunity and anti-harassment policies, as of Oct. 9, 2018, New York State law mandated that employers' policies must contain specific information that would not otherwise have been in a written employee policy. Such policies must:

- prohibit sexual harassment consistent with guidance issued by the New York Department of Labor in consultation with the New York State Division of Human Rights;
- provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information relating to the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- include a written complaint form that employees may use to submit complaints or notify emplo-yees where such form may be found;
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment, as well as against any supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Employers must also be aware of their obligation to ensure that non-employee third parties are not subject to unlawful discriminatory practices in the workplace and that their employees are not subject to the same from such third parties.

Every New York employer should immediately confirm that its written policy complies with these requirements.

Under New York City law, employers are required to post a notice made available by the New York City Commission on Human Rights, in both English and Spanish, in a conspicuous location in the workplace accessible to all employees setting forth employees' rights under the Stop Sexual Harassment in NYC Act. The notice may also be posted virtually if electronic posting is the most effective method of reaching employees. In addition, separate from the notice requirement, New York City law requires employers to distribute a fact sheet explaining employees' rights at the time of hire.

(2) Annual Training

By now every employer in New York should have taken steps to ensure that all of their employees working in New York will have received interactive anti-sexual harassment training on or before Oct. 9, 2019, and that such training meets the minimum standards under the law. Employers should also have a plan in place for how they will deal with new hires throughout the year and satisfy the annual training requirement.

In conjunction with the training requirement, employers must provide employees with a written notice that contains a copy of the employer's anti-sexual harassment policy and the information presented at the employer's anti-sexual harassment training program. This must be delivered to all new employees at the time of hire, and then again when the employee receives annual training. Notices must be provided in English, as well as in the primary language identified by each employee.

(3) Convey Importance to Management

Employers must maintain and clearly convey a zero-tolerance policy for any inappropriate behavior by a manager and such policy must be consistently enforced. Adoption of a non-fraternization policy prohibiting romantic relationships between management and staff is

one way to set the tone. Another is to be direct with management. Managers should be trained in separate sessions from staff employees. These manager trainings are an ideal setting for communicating expectations, such as an absolute intolerance for any impropriety.

By virtue of their position, managers should be attuned to the dynamics of the work environment, which includes the conduct of and relationships among their subordinates. Managers must be able to intercept and alter an employee's conduct before it adversely affects the workplace environment and long before any situation devolves into an actionable claim.

(4) Train Those Responsible For Receiving Complaints

Whether it is a manager, a human resources professional, or the President of the company who has been designated to receive reports of harassment, that individual needs to have professional training as to how they should handle such a report. If only one individual has been designated to receive harassment complaints, employees may not be comfortable reporting situations in which that individual is involved. Thus, there should always be at least two individuals identified to receive reports of harassment.

One of the most common and easily preventable situations that creates significant liability for an employer occurs when a manager or other individual receiving a report of harassment believes they should comply with an employee's request to keep their complaint "confidential." There is no such thing as "a confidential complaint of harassment." Once an employee makes a report of allegedly harassing behavior that has occurred or is occurring either against themselves or another employee, there is no leeway for the individual receiving the complaint to keep that employee's "secret," regardless of whether that employee has for any reason implored the recipient of this information either not to reveal what they have reported or to wait to take action on it. Accordingly, employers must not promise complete confidentiality of complaints, but instead can offer that the complaint will only be shared with those who have a need to know.

(5) Culture

While not legally required, employers would be well served by encouraging a culture of respect and inclusivity in the workplace. Not only is this because the best defense is a good offense, but also because employee satisfaction is key to the success of most businesses. An atmosphere of respect and awareness of personal differences among employees can prevent inappropriate behavior from occurring in the workplace. Not only will this protect a business, it will also help it to grow by boosting morale and productivity among employees.

Employers must also be aware of their obligation to ensure that non-employee third parties are not subject to unlawful discriminatory practices in the workplace and that their employees are not subject to the same from such third parties. This includes, but is not limited to, clients, vendors, and consultants. In this way, a perceivable atmosphere and culture of respect and awareness will also protect a business by communicating that unlawful misconduct will not be tolerated by anyone.

No employer wants to be in the position of having to defend against a claim of unlawful workplace harassment—it is expensive, time-consuming, and distracting. Implementing these best practices will not only help mitigate the risk of employee claims but, even more importantly, will foster a respectful and harassment-free workplace for all.