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ATTORNEYS AT LAW

# Harassment Prevention: Overview of the New York Sexual Harassment Prevention Law

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# Today's Agenda

- Brief Harassment and Discrimination Overview
- Recent Changes to New York State Law

# HARASSMENT AND DISCRIMINATION IN A NUTSHELL

# There Are Two Types of Workplace Harassment

<b>Quid Pro Quo Harassment</b>	<b>Hostile Work Environment Harassment</b>
<ul style="list-style-type: none"><li>▪ Tends to be a very direct form of harassment. “If you have sex with me you will get a raise” or “If you date me you will get a promotion”.</li><li>▪ But can be more subtle ... because you are flirtatious with your boss you are not disciplined when you are late to work (this is more often brought forward as sex discrimination cases by non-flirtatious employees).</li><li>▪ To be illegal, there must be tangible adverse employment action related to sex or gender. (Example, efficient worker is not disciplined for being late but less efficient workers are...while not good to enforce policy inconsistently...this would not constitute unlawful sexual harassment or sex discrimination).</li><li>▪ Liability for a supervisor’s <i>quid pro quo</i> acts are in all instances imputed to the employer vicariously without a defense available.</li></ul>	<ul style="list-style-type: none"><li>▪ This is the far more common theory of harassment.</li><li>▪ A hostile work environment exists where:<ul style="list-style-type: none"><li>▫ The workplace is permeated with offensive conduct such that enduring the conduct becomes a condition of continued employment; or</li><li>▫ The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.</li></ul></li><li>▪ <i>Hostile work environment is a specific legal standard. It should not be used to describe rude or uncivil behavior (even when unacceptable) unless it is related to unlawful discrimination based on a protected class.</i></li></ul>



# Who Can Harass Who?

- Male → Female
- Female → Male
- Male → Male
- Female → Female
- Supervisor → Subordinate
- Subordinate → Supervisor
- Vendor /Visitor/Constituent→ Employee
- Employee→ Vendor /Visitor/Constituent



# Liability Depends on the Perpetrator

There is different liability when dealing with co-worker harassment versus supervisor harassment.

Co-Worker on Co-Worker Harassment	Harassment by a Supervisor
<ul style="list-style-type: none"><li>▪ Employer liability exists for harassment by co-workers where:<ol style="list-style-type: none"><li>(1) The employer provides no reasonable avenue for complaint (<i>i.e.</i>, no policy or policy was ineffective); or</li><li>(2) The employer knew of the harassment but did nothing about it (e.g., supervisor hears John make a joke about Jane's big breasts and walks away).</li></ol></li><li>▪ No employer liability will exist where the employer can show that it took immediate and appropriate corrective action.</li><li>▪ This is why it is so essential for employees and supervisors to report complaints or concerning behavior to HR even if the employee does not complain!</li></ul>	<ul style="list-style-type: none"><li>▪ All harassment is bad, but the situation is far more serious when a supervisor is the harasser.</li><li>▪ An employee who brings a claim of harassment by a supervisor is entitled to a presumption that the employer is automatically liable for the harassment.</li><li>▪ Employer will not be liable for harassment committed by a supervisor only if:<ol style="list-style-type: none"><li>(1) No tangible employment action was taken as part of the alleged harassment (such as discharge, demotion, or undesirable reassignment);</li><li>(2) The employer exercised reasonable care to prevent and promptly remediate any harassing behavior; and</li><li>(3) The plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid <u>harm</u> otherwise.</li></ol></li></ul>

# Retaliation is Also Illegal

- Employers are obligated to protect employees against retaliation.
- Retaliatory behavior is not limited to hiring and firing. For example:
  - Employee complains of harassment and the supervisor moves her office to the basement, takes away her overtime, takes away her computer, excludes her from office meetings or social events
- Retaliation claims may be founded even if the original complaint is unfounded.



# RECENT CHANGES TO NEW YORK STATE LAW

# New Requirements, Effective October 9, 2018

- April 12, 2018, the governor signed into law a budget that included several changes and additions to workplace anti-sexual harassment law.
- The amendments require all employers to adopt a "sexual harassment prevention policy" as well as a "sexual harassment prevention training program."
- The amendments require employers to either adopt the state's model policy (to be published by the DOL) or establish an anti-sexual harassment prevention policy that "equals or exceeds" the model policy, which will have certain required components set forth in the law.
- **The amended law also requires employers to conduct sexual harassment prevention training for "all employees" on an annual basis.** Employers may adopt the state's model training program (to be published by the DOL) or produce their own program that "equals or exceeds" the minimum standards in the model program.



# Stricter New York State Law

- With the recent changes to the 2018 NYS General Municipal Law, employees can now be held **personally liable** for sexual harassment.
- If a public employee is found guilty of sexual harassment by a "final judgement" and the public employer pays any portion of a monetary award to the individual complaining of sexual harassment, the public employee will be required to **reimburse his/her employer** within 90 days of the agency's payment.



# New York's Model Policy

- At a minimum, the policy must:
  - Prohibit sexual harassment
  - Provide examples of prohibited conduct that would constitute unlawful sexual harassment
  - Include information concerning the federal and state laws about sexual harassment and remedies available to those who experience it
  - Include a statement that there may be applicable local laws
  - Include a standard complaint form
  - Include a procedure for the timely and confidential investigation of complaints and due process for all parties

# New York's Model Policy (continued...)

- Information about individuals' 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 **and against supervisory and managerial personnel who knowingly allow such behavior to continue**
- Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is prohibited



# New York's Model Policy (continued...)

- Observations from Model Policy
  - Could ultimately promote external complaints by noting at the outset that employees may file a complaint internally or with a government agency or court.
  - Requires complaints to be thoroughly investigated, with investigations being “commenced immediately” and completed “as soon as possible.”
  - States policy must be “posted prominently in in all work locations to the extent practicable”.
  - Establishes onerous procedural requirements for investigations.
  - Includes detailed information regarding pursuit of potential legal remedies.
  - Includes recognition that the investigation process may vary from case to case.

# New York's Model Policy (continued...)

- Observations from Model Policy
  - Anti-retaliation provision is front and center
  - Details where sexual harassment can occur – includes travel, work parties or events, text messages, social media (even during non-work time).
  - Inform third-party vendors and other non-employees of your policy.

# New York's Model Training Program

- Every employer in New York State is required to provide employees with sexual harassment prevention training.
- An employer that does not use the model training developed by the Department of Labor and Division of Human Rights must ensure that the training that they use meets or exceeds the following minimum standards.
- Model training materials are available to employers to download at <https://www.ny.gov/combating-sexual-harassment-workplace/employers>



# New York's Model Training Program

- At a minimum, the training program must:
  - Be interactive
  - Include an explanation of sexual harassment
  - Include examples of unlawful sexual harassment
  - Include information concerning the federal and state laws about sexual harassment and remedies available to those who experience it
  - Information about individuals' rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
  - Include information addressing conduct by supervisors and any additional responsibilities for supervisors



# New York's Model Training Program (continued...)

- Observations from the Model Training Program
  - Employees must receive training on an annual basis.
    - All must receive training before October 9, 2019.
  - States new hires should complete training “as quickly as possible” upon hire.
  - Training may include additional interactive activities.
  - Training should be provided in the language spoken by each employee.



# Observations from New York's Model Training Program

- Teaches employees about quid pro quo versus hostile environment harassment
- Includes a segment on sex stereotyping
- Teaches employees about the heightened duty of supervisors
- Includes instructions for witnesses of harassment (creates bystander reporting expectations)
- Includes multiple case studies with question-and-answer segments

# Specific Considerations for Contractors

- New requirements for contractors bidding on public contracts.
  - Must affirm that they have implemented a compliant sexual harassment policy and that they provide annual sexual harassment prevention training.
  - Each bid to New York where competitive bidding is required must contain language regarding compliance.

# Other Noteworthy Amendments

- The budget bill expanded state law by holding employers liable to "**non-employees**" (example vendors and independent contractors) who suffer sexual harassment in the employer's workplace.
- The budget bill makes null and void "any clause or provision in any contract" that requires "mandatory arbitration to resolve any allegation or claim of unlawful discriminatory practice of sexual harassment."
- The budget bill provides that employers will not "have the authority" to include "any term or condition that would prevent the disclosure" of the complaint in any settlement agreement relating to sexual harassment. Sexual harassment plaintiffs, however, will retain the option of abiding by a confidentiality provision if they so choose, in accordance with certain prerequisites.
- The legislation imposes **personal liability** on public employees found guilty of intentional wrongdoing related to a sexual harassment claim.



# Action Items

- Complete an independent review of existing non-harassment policies, procedures and training programs.
- Finalize compliant Sexual Harassment Policy and Complaint Form
- Post in every location
- Develop a plan for completing employee training

# Thank you!

## Questions?

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