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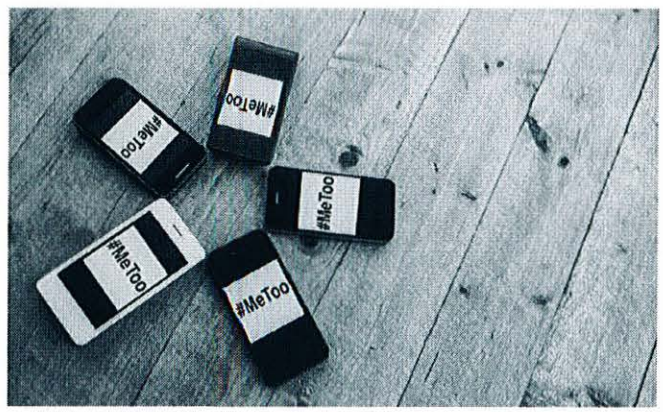
New York, New York! Taking the Lead to Combat Sexual Harassment in the Workplace

With the #MeToo movement, Gov. Andrew Cuomo and Mayor Bill de Blasio have come out swinging in a proactive attack to combat sexual harassment throughout New York. Employers should be aware that the new state sexual harassment laws are applicable to employers of all sizes, even to companies with just one employee.

By **Kathryn Barcroft** | October 17, 2018

With the #MeToo movement, Gov. Andrew Cuomo and Mayor Bill de Blasio have come out swinging in a proactive attack to combat sexual harassment throughout New York. Employers should be aware that the new state sexual harassment laws are applicable to employers of *all* sizes, even to companies with just one employee. NY State Human Rights Law, N.Y. Exec. Law §292.



If you are a company in New York without a sexual harassment policy or a policy that has not been updated in response to the recent legislation,

your company may not be in compliance with New York's state and city anti-harassment laws. No later than Sept. 6, 2018, companies in New York City were required to display a poster in the workplace concerning a company's anti-sexual harassment rights and responsibilities to workers and to distribute a fact sheet detailing sexual harassment as created by the NYC Human Rights Commission. The New York City "Stop Sexual Harassment Act Factsheet (https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsh can be found on the NYC Human Rights Commission's website. The fact sheet, which is mandatory in each New York City office, defines sexual harassment, provides examples of sexual harassment, prohibits retaliation, provides a telephone number to report harassment to the NYC Commission, and provides information on where to file a complaint. Companies in violation of this posting requirement may be subject to up to $250,0000 in fines for a willful violation as well as other damages.

As of Oct. 9, 2018 employers in New York state are also required to create and distribute a sexual harassment policy that meets or exceeds the Model Sexual Harassment Policy (https://www.ny.gov/combating-sexual-harassment-workplace/employers) published by New York state. The policy must include a specific prohibition on sexual harassment at the company with examples of unlawful sexual conduct, detail a procedure for the time sensitive and confidential investigation of complaints, provide a sexual harassment complaint form, describe state, federal, and local laws where employees can seek redress, include a statement that harassment is employee misconduct and the wrongdoer as well as supervisors who are aware of the misconduct will be sanctioned, and clearly prohibit retaliation against the reporting employee or witnesses in the investigation.

It is also now mandatory that every employee in the state complete sexual harassment training by Oct. 9, 2019. This training can be web-based if it is interactive with questions where an employee must respond and/or submit a

feedback survey, or it can be in person or live with a trainer where the presenter engages in Q&A with the company's employees. In addition to the interactive requirements, the company trainer is required to explain the definition of sexual harassment and provide specific examples of sexual harassment, detail an employee's rights of redress including the internal complaint process, provide information concerning the federal and state legal remedies available to victims and that local laws might be applicable, and describe the duties of supervisors and managers to report sexual harassment that they become aware of in the workplace. New York State, Sexual Harassment Model Training (https://www.ny.gov/combating-sexual-harassment-workplace/employers).

In New York City, companies with 15 or more employees have one year from April 1, 2019, the effective date of the Stop Sexual Harassment Act (https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page), to implement the mandatory sexual harassment training. Companies that are required to meet both the New York City and New York state deadlines for the training should create a program that satisfies all training requirements. New York City requires recordkeeping, where companies must keep a record of all trainings as well as an acknowledgement signed by each employee who participates in the training. New York City companies are also required to include a statement that sexual harassment is a form of unlawful discrimination under the New York City Human Rights Law, provide information concerning the complaint process available through the New York City Human Rights Commission, and provide information concerning bystander intervention in connection with reporting sexual harassment. NYC Code §8-107(30).

Employers in New York should also be aware of other important provisions that impact their companies in connection with the recently enacted sexual harassment legislation. For example, the New York State Human Rights law

has been amended to address misconduct by both employees and non-employees such as third-party contractors, consultants and vendors who provide services at a company. New York State Human Rights Law, N.Y. Exec. Law §296-d. Also since July 2018, employers are not permitted to include non-disclosure provisions in an agreement settling a sexual harassment claim unless it is the employee's preference that such a provision be included in the agreement and that preference is memorialized in an agreement signed by all parties. The complaining employee has 21 days to consider the condition of non-disclosure in the settlement agreement, if after the 21 days the employee agrees to the preference for confidentiality it must be documented and signed by all parties. NY CPLR §5003-b Non-disclosure Agreements. There is a seven-day revocation period where the employee who expressed the preference can revoke the agreement and the agreement is not effective until the expiration of this date. Id.

While other states in the country have sexual harassment policies to varying degrees, few come close to the inclusive policies of New York in the wake of the #MeToo movement. A majority of states have not enacted state legislation in response to the #MeToo movement. Some states have sexual harassment policies and training requirements for state employees only while other states merely express a strong preference that companies provide sexual harassment training to employees but do not require training. Other states, however, are actively making changes to their policies in response to the #MeToo movement. Of the states that have been proactive in the wake of #MeToo it is useful to compare the policies.

The Weinstein scandal made California the epicenter of the #MeToo movement, so it is no surprise that California is one of the states taking the lead to enact legislation to protect workers. On September 30, 2018, California continued to wage war on sexual harassment with the governor signing into law several bills that provide a useful comparison to New York State's anti-

harassment laws and provide some insight into the evolution of state action in response to a national movement. In an unprecedented move, California has passed legislation to require that publicly held companies who have principal executive offices in California have at least one female director on its board by the close of the 2019 calendar year. California Senate Bill No. 826 Chapter 954. By the end of 2021, California corporations must increase the number of female board directors based on the total membership of the board. Specifically, if the board is comprised of four or fewer directors, one board member must be female, if the board is comprised of five directors at least two board members must be female, and if the total membership of the board is six or more at least three members must be female.

California has also taken broad action with respect to confidentiality agreements by passing a requirement that employers cannot prohibit the disclosure of "factual information" that underlies an allegation of harassment on which a settlement agreement is based. California Senate Bill No. 820 Chapter 953. The California law does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim. Id.

Employers in California are also now prohibited from requiring that a current employee at a company release a harassment claim in exchange for additional benefits from their current employer. California Senate Bill No. 1300 Chapter 955. Recent California legislation also alters the burden of proof for victims of sexual harassment, making "a single incident of harassing conduct sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." Id.

Interestingly, California differs from New York in its sexual harassment training requirement. California has modified its training requirement from its previous requirement for companies with 50 or more employees to provide sexual harassment training to requiring companies with 5 or more employees to provide at least two hours of classroom and/or interactive training to supervisory employees and at least one hour of training for non-supervisory employees by Jan. 1, 2020. California Senate Bill No. 1343 Chapter 956. These requirements are still less than for New York where all companies are required to institute sexual harassment training and policies.

Delaware is another recent state to begin altering its sexual harassment policies. On July 1, 2018, Delaware passed an amendment to the Delaware Code relating to Employment Practices, which will go into effect on Jan. 1, 2019. Delaware House Bill 360. The amendment requires that the Delaware Department of Labor create a fact sheet for employers which will state that sexual harassment is illegal, the definition of sexual harassment, the remedies and complaint process, how to contact the Department of Labor, and the illegality of retaliation. The amendment also requires an interactive training process for employers with 50 or more employees be given within a year of enaction and then every two years. Supervisors must also undergo an additional training regarding their responsibilities to "prevent and correct" sexual harassment.

States like Connecticut and Maine have had sexual harassment training practices in place even before the #MeToo movement. Recently, Connecticut attempted, with its Times Up legislation, to enact broader training requirements with a proposal to expand the current requirement of two hours of training for employers with 50 or more employees to require training for *all* supervisory employees and for nonsupervisory employers at companies with 20 or more employees. Connecticut Employment Law Blog—Revised Sexual Harassment Training Bill (May 6, 2018). The legislation failed to pass in

Connecticut. Maine currently requires employers with 15 or more employees in the workplace to conduct an education and training program for all new employees within one year of commencement of employment. Title 26 M.R.S.A. §807.

With the #MeToo movement, other states should soon follow in enacting their own sexual harassment prevention laws. It is ultimately up to company executives, however, to take action to hire trained investigators, attorneys, and Human Resource personnel to ensure that company policies are not only drafted correctly, but also implemented and enforced in the workplace. Given the sensitive nature of sexual harassment investigations, trained company representatives or outside Human Resource companies must conduct investigations impartially and thoroughly. Supervisors and managers must also be properly trained in how to address workplace misconduct. Without meaningful action, companies will continue to face liability for sexual harassment and the policies will not be worth the paper they are written on.

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