

The Wait Is Over: New York State Releases Final Sexual Harassment Guidance and Training Resources

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On October 1, 2018, New York State released its final sexual harassment guidance and resources, including (i) a [model sexual harassment policy](#), (ii) [model training materials](#), (iii) a [model complaint form](#), and (iv) [Frequently Asked Questions](#) (“FAQs”) (collectively, “Guidance”). The Guidance, which is now available on the state’s “Combating Sexual Harassment in the Workplace” [website](#), contains key differences from the draft guidance issued in August.¹ One of the most significant revisions is the extension of the deadline for training New York-based employees, from January 1, 2019, to October 9, 2019, providing employers an additional nine months to comply. Even though the training deadline has been extended, New York employers should begin to develop a plan to implement a training program as soon as practicable given that employees will be subject to the new harassment policy requirements on October 9, 2018.

As a reminder, the 2018-2019 New York State Budget, signed into [law](#) in April 2018, contained several laws pertaining to sexual harassment, including a requirement that New York employers maintain and distribute an anti-sexual harassment policy and provide interactive sexual harassment training on an annual basis to all employees. The budget also included laws prohibiting mandatory final and binding arbitration of sexual harassment claims and barring non-disclosure agreements (“NDAs”) pertaining to sexual harassment claims unless such confidentiality is the preference of the complaining party. Details on these items, as clarified in the Guidance, follow.

¹ For additional information on the draft materials, please see Epstein Becker Green’s *Act Now Advisory* entitled “[New York State Provides Draft Anti-Sexual Harassment Materials for Employers](#).”

Training

In addition to extending the training deadline from January 1, 2019, to October 9, 2019, the FAQs:

- eliminate the requirement that new hires be trained within 30 days of hire, and instead instruct that they receive training “as soon as possible”;
- explain that, while employees must be trained annually, after the first training, the date of subsequent training may be based on the calendar year, the anniversary of each employee’s start date, or any other date the employer chooses;
- reiterate that the training must be conducted in the language spoken by the employee; however, employers may conduct the training in English if the State does not have model training in an employee’s primary language (although employers are encouraged to provide the training in the employee’s primary language, if possible);
- clarify that if an employer has already provided anti-sexual harassment training to employees this year that:
 - met or exceeded the requirements under applicable law, the employer is not required to provide additional training to employees until the next training cycle, or
 - did not meet all the new requirements, the employer need only provide supplemental training addressing the new and previously uncovered topics, instead of providing completely new training;
- expressly state that there is no required minimum number of training hours per year; rather, employees must simply receive training that meets or exceeds the minimum standards;
- eliminate the requirement that employees who work as few as one day during the year in New York be provided anti-sexual harassment training, and instead state that employees who work a “portion of their time” in New York must be trained; and
- clarify that, for purposes of training, the term “employee” includes all workers, regardless of immigration status, as well as exempt or non-exempt employees, part-time workers, seasonal workers, and temporary workers, and that minors must receive training as well (although such training may be modified to be appropriate for individuals of the employee’s age).

The FAQs clarify that training may be delivered online, so long as it is interactive. Examples of “interactive” online training include having questions at the end of a section that require the employee to select the right answer, and having an option to submit a

question online and receive an answer immediately or in a timely manner. An example of an interactive in-person or live training is having the presenter ask the employees questions or giving them time throughout the presentation to ask questions. The FAQs make clear that an individual watching a training video or reading a document, with no additional feedback mechanism or interaction, would not be considered interactive.²

The FAQs state that employers are encouraged to keep a copy of training records. Finally, the FAQs specify that employees must be paid for time spent training, including any time spent training during the onboarding process before the employee's actual assignments begins.

Sexual Harassment Policy

The revised model sexual harassment policy includes some notable changes from the draft model policy. First, the 30-day period for completion of investigations has been removed. Instead, the model policy now states that investigations must be commenced "immediately" and should be completed "as soon as possible." Second, in accordance with the Equal Employment Opportunity Commission's guidance and recommendation, the reference to "zero tolerance" for sexual harassment has been eliminated. (The agency had found that "zero tolerance" policies lead to individuals being hesitant to complain about harassment, for fear of getting the alleged wrongdoer fired under any circumstance.)

The FAQs explain that a sexual harassment policy can be provided to employees in writing or electronically, and that if the policy is made available on a work computer, employees must be able to print a copy for their own records. Also, the FAQs suggest that the sexual harassment policy should be provided to new hires "prior to commencing work," which means that employers should take care to distribute the policy to new hires during or prior to onboarding. Finally, although not required, the FAQs encourage employers to supply a policy and training to anyone providing services in the workplace, including independent contractors, vendors, or consultants.

Complaint Form

Although a complaint form is not required to be included as part of a policy, all New York State sexual harassment policies must clearly state where an employee may find a complaint form. The most significant change to the model complaint form is the elimination of the questions about whether an employee has filed a claim with a federal, state, or local government agency or instituted a legal suit or court action regarding this complaint.

² Employers may choose to use a third-party vendor or organization to provide training so long as the training meets or exceeds the minimum standards required under the law.

Non-Disclosure of Harassment Complaints

As we noted in our prior [Act Now Advisory](#), effective July 11, 2018, nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims are prohibited, unless inclusion of the clause is the complainant's preference.

As such, the Guidance confirms that, prior to including an NDA in a settlement agreement, the complainant must be provided with the nondisclosure term or condition provision in writing, and he or she will have 21 days to consider it. Then, the complainant will have seven days to revoke his or her decision. Only then can the agreed-upon provision be included in the larger settlement agreement.

The revised FAQs clarify that this 21-day period cannot be waived, shortened, or calculated to overlap with the seven-day revocation period. The FAQs further specify that unlike the federal provisions for waiving age discrimination claims (which also include a 21-day review period and seven-day revocation period), the NDA provision requires a separate agreement to be executed after the expiration of the 21-day consideration period and the seven-day revocation period before the employer is authorized to include confidentiality language in a proposed resolution.

Mandatory Arbitration

There were no notable changes to the mandatory arbitration FAQs.

What New York Employers Should Do Now

- Review the Guidance, including your model harassment policy and training program.
- Review and revise, as necessary, policies regarding sexual harassment in the workplace to conform to the requirements of the new law pertaining to sexual harassment policies, and include a complaint form.
- Make sure that compliant sexual harassment training of all New York employees and managers is completed no later than October 9, 2019.
- If training has already been provided that does not meet all the minimum requirements, provide supplemental training no later than October 9, 2019.
- Prepare to provide such training on an annual basis.
- Ensure that compliant sexual harassment training of all new employees is completed "as soon as possible."
- Determine the language(s) in which training should be conducted.
- Translate policies, and provide training in an employee's primary language(s).

- Review any arbitration agreements or programs requiring the arbitration of sexual harassment claims to determine if any revisions are required on a going-forward basis.
- Prepare agreements seeking confirmation that the confidentiality of facts and circumstances underlying harassment claims are, indeed, the preference of the complaining person. Such agreements must be reviewed for 21 days, and once the complaining person's preference has been memorialized, the individual will have seven days to revoke his or her preference before such agreements can be included in a broader settlement document.
- Train human resources professionals and internal legal counsel regarding all essential components of the new laws mentioned above.
- Train human resources professionals and managers on the New York State requirements regarding the [applicability of the sexual harassment policy and protections to non-employees](#).

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