

Delaware Expands Sexual Harassment Protections and Mandates Anti-Harassment Training

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On August 29, 2018, Delaware Governor John Carney signed into law [House Bill 360](#) (“Law”), adding Delaware to the already significant list of states that have recently enacted laws expanding workplace protections against sexual harassment. Of importance is the expanded definition of what constitutes sexual harassment, and the mandate that employers with 50 or more employees in Delaware provide interactive anti-sexual harassment training to employees and supervisors. The Law also requires employers with four or more employees in Delaware to distribute [state-issued information sheets](#) to employees explaining their rights and remedies. The Law takes effect on January 1, 2019.

With the enactment of this Law, Delaware becomes the fifth state to mandate anti-sexual harassment training, and the second this year (New York State, as well as New York City, adopted even broader training requirements earlier this year, joining California, Connecticut, and Maine). The expanded sexual harassment protections and new training requirements under the Law are the latest indications that the #MeToo movement, which, just one year ago, refocused the nation’s attention on sexual harassment, is not abating anytime soon.

Employers, Employees, and Supervisors: Broad Coverage and Definitions

Although Delaware already prohibits workplace sexual harassment, the Law, which applies to employers with four or more employees within the state at the time of the alleged harassment (or retaliation), expressly designates such conduct as a discrete unlawful employment practice. Further, the Law expansively defines “employee” to include state employees, unpaid interns, applicants, joint employees, and apprentices.¹ This broad definition of “employee” means that the Law will apply to more employers.

The statute also liberally defines a “supervisor” as an individual who is “empowered by the employer to take an action to change the employment status of an employee *or who*

¹ Employees of employment agencies who are placed at client (“site”) employers are considered the employees of the employment agency only (and not the site employer) for purposes of mandated training.

directs an employee's daily work activities" (emphasis added). While the first part of this definition is the traditional, more stringent definition, the latter part of the definition is much broader and can potentially increase an employer's legal exposure.

Definition of Sexual Harassment and the Scope of Employer Liability

Under the Law, sexual harassment occurs when an employee is subjected to behavior that includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," and:

- the employee's submission to such behavior is made either explicitly or implicitly a term or condition of employment;
- the employee's submission to or rejection of such conduct "is used as the basis for employment decisions affecting" the employee (note: the fact that the employment decision need only "affect" the employee is much broader than the generally applied standard requiring that the decision *adversely* affect the employee); or
- the behavior has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

An employer may be held liable for sexual harassment:

- when a supervisor's sexual harassment of an employee results in a "negative employment action"² being taken against the employee;
- when the employer knew or should have known of sexual harassment by an employee's co-worker and failed to take appropriate corrective measures; or
- for retaliation against an employee for engaging in such protected activities as filing a discrimination charge, participating in a sexual harassment investigation, or testifying in any proceeding or lawsuit about alleged sexual harassment.

In response to a specific claim that submission to or rejection of the harassing conduct was the basis for employment decisions affecting the employee, an employer may avoid or mitigate liability if it can show that (i) it exercised reasonable care to prevent and correct any harassment promptly and (ii) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, such as the employer's complaint procedure.

² The Law defines "negative employment action" as "an action taken by a supervisor that negatively impacts the employment status of an employee." This definition is broader than the federal standard of an "adverse action."

Required Anti-Sexual Harassment Training

The Law imposes interactive anti-sexual harassment training and education requirements on employers with 50 or more employees in Delaware. Applicants and independent contractors are not counted towards the 50-employee threshold, and employers do not need to provide training to applicants, independent contractors, or employees employed for less than six continuous months.

A covered employer must provide interactive anti-sexual harassment training to current employees and supervisors within one year of the Law's effective date (i.e., by January 1, 2020) and every two years thereafter.³ New employees must receive such training within one year after hire and every two years thereafter, and new supervisors must receive training within one year of the commencement of employment as a supervisor, and every two years thereafter.

The training for employees must be interactive and include:

- a statement that sexual harassment is unlawful;
- the legal definition of "sexual harassment," using examples;
- a description of the legal remedies and complaint process available to an employee who wants to lodge a complaint of sexual harassment;
- instructions on how to contact the Delaware Department of Labor ("DDOL"); and
- information on the legal prohibition against retaliation.

In addition to this training, supervisors must receive supplemental interactive training on:

- a supervisor's specific responsibilities with respect to preventing and correcting sexual harassment, and
- unlawful retaliation.

Notice Requirement

The DDOL "[information sheet](#)" notifying employees of the right to be free from sexual harassment in the workplace generally covers the same topics set forth in the mandatory training requirements.

³ If an employer provides training to its employees prior to January 1, 2019, that would satisfy the requirements of the Law; no additional training is required until January 1, 2020.

Covered employers are required to distribute the information sheet to new employees at the commencement of their employment and to existing employees within six months of the Law's effective date, i.e., by July 1, 2019.

The Law Reinforces the DDOL's Broad Powers

The Law reiterates the DDOL's expansive authority to "prevent any person from engaging in any unlawful employment practice." Most significantly, these powers include, among others, the right "to enter any place of employment at reasonable times ... [and] inspect and copy records or documents in the possession of the employer ..." as well as the authority to take depositions, issue subpoenas compelling the testimony of witnesses and the production of documents and records, and commence civil actions for violations of the Law.

What Delaware Employers Should Do Now

Covered Delaware employers should:

- evaluate, and, where necessary, update their sexual harassment policies and procedures to ensure that they reflect the expanded protections afforded by the Law;
- make sure that all employees and supervisors understand their obligations under the Law, particularly with respect to the kinds of conduct that constitutes sexual harassment and how to prevent or stop it;
- provide the DDOL [information sheet](#) to current employees by July 1, 2019, and ensure that the information sheet is part of the onboarding process for new hires; and
- develop compliant interactive training programs for both employees and supervisors.

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