

October 10, 2018

# New York State Department of Labor Issues Final Guidance on Sexual Harassment Prevention Policies and Training

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## Revised Materials Clarify That Training Deadline Is October 9, 2019 – Not January 1, 2019 as Previously Stated

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### SUMMARY

As we reviewed in our April 23, 2018 memorandum, available [here](#), New York State enacted this year a sweeping anti-sexual harassment law with anti-sexual harassment training and policy requirements applicable to every employer in New York State. In late August, the New York State Department of Labor issued draft model documents for employer anti-sexual harassment policies and training programs, which we reviewed in our memorandum available [here](#). On October 1, the Department issued final model documents and Frequently Asked Questions, which addressed many of the ambiguities in the original drafts. Most notably, the deadline for the required annual interactive anti-sexual harassment training was extended to October 9, 2019. The State has made all of its materials related to the anti-sexual harassment law available on the internet.<sup>1</sup> This memorandum summarizes the revised content in the model documents and FAQs.

### BRIEF OVERVIEW

- As we previously reported, all employers in New York State, including non-profit organizations and employers of domestic workers, are required to have in place by October 9, 2018 a compliant anti-sexual harassment policy. The policy may be posted electronically and does not need to be distributed in hard copy so long as the employer provides access to a computer that an employee may use to print a copy of the policy. The policy must be available in a language spoken by the employee. Employers **must also provide employees access to a written complaint form**.

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- All employers in New York State must provide interactive anti-sexual harassment training by October 9, 2019 to all employees (including temporary or part-time employees) who work or will work in New York State. Although the training must be interactive, it does not need to be presented live and it may be web-based.
- An employer's anti-sexual harassment policy and training program need only be provided to employees, although the FAQs state that employers are "encouraged" to provide the policy and training to anyone providing services in the workplace.
- All employers in New York are liable for sexual harassment experienced by independent contractors and other non-employees in the employer's workplace.

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### MODEL DOCUMENTS – WHAT'S NEW

The final Model Sexual Harassment Policy contains the following notable changes:

- ***New definitions.*** "Employees" has been defined in relevant part to include "all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status." "Non-employee" is defined in footnote two as "someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, 'gig' workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer." These definitions are notable because they seem to be overlapping.
- ***Employer investigations.*** The final model policy clarifies that investigations of complaints are to be kept "confidential to the extent possible" and states that the process for employer investigations "may vary from case to case." Employer investigations also are no longer required to be finished within 30 days; rather, the investigation must be "prompt and thorough, commenced immediately and completed as soon as possible." The model policy also provides that the written documentation of the investigation should not only set forth the corrective actions that will be taken, but the "basis for the decision" regarding the resolution of the complaint.
- ***Sexual harassment on the basis of "self-identified or perceived sex, [or] gender expression."*** Sexual harassment is defined to include harassment on the basis of "self-identified or perceived sex, [or] gender expression," as well as gender identity and the status of being transgender. In 2016, the NYS Division of Human Rights issued regulations providing that "discrimination on the basis of gender identity is sex discrimination" and that the "term 'sex' when used in the Human Rights Law includes gender identity and the status of being transgender." "Self-identified or perceived sex" and "gender expression," however, were not part of the regulations and appear to be newly asserted here as protected categories. And the "Examples of Sexual Harassment" section now also includes an example that "sex stereotyping"—"when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look"—may be unlawful sexual harassment.
- ***Revised language.*** The updated materials also modified several phrases used in the draft model policy. The references in the draft model policy to an employer having a "zero tolerance policy" for sexual harassment and retaliation were removed (consistent with EEOC guidance disfavoring use of that phrase); "targets" replaced "victims" to describe persons subjected to sexual harassment and the word "harassers" replaced "perpetrators"; and in the description of "Retaliation," the final model policy states that "the retaliation provision is not intended to protect persons making intentionally false charges of harassment."

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The final Model Sexual Harassment Prevention Training contains the following notable changes:

- **Training deadline.** The deadlines for training were changed. All current employees must complete the new training requirement before October 9, 2019 (no longer January 1, 2019) and all “new employees” should complete the training “as quickly as possible” (no longer “within 30 calendar days of their start date”).
- **Consistency with model policy.** Parallel modifications were made to the training as was done to the policy (e.g., the training’s section on “zero tolerance” was removed; the training’s description of the investigation procedure removes the 30-day deadline).
- **Model PowerPoint.** The October materials now include a PowerPoint presentation that can be used by an employer; the draft documents did not have that available.

The final Anti-Sexual Harassment Policy Minimum Standards and Minimum Training Standards Checklist remain the same as in the original drafts.

The final Model Complaint Form is largely similar to the earlier model form, but contains the following notable changes: (1) the form does not ask whether the employee filed a claim with a government agency or a lawsuit in connection with the complaint; (2) the form does not ask whether the employee has hired an attorney; and (3) the form removes certain disclosures to employees concerning their ability to file claims with certain entities or in court—albeit this information is contained in the final model policy. As noted below, employers are not required to provide a copy of the complaint form in their anti-sexual harassment policy to the extent the employer informs its employees where the form may be located (such as the company’s internal website).

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### FAQS – WHAT’S NEW

There are several significant updates to the positions taken by the Department of Labor in the final FAQs.

- Question 2 in the “For Employers” section of the FAQs states that there is no employer responsibility to train non-employees but notes that the “posting a copy” of the policy “in an area that is highly visible further communicates [the employer’s] effort as a responsible employer.”
- Question 4 in the “For Employers” section states that employers are not required to provide the policy to non-employees. It notes, however, that: “[T]he State Human Rights Law imposes liability on the employer for their actions, and you are encouraged to provide the policy and training to anyone providing services in the workplace.”
- Question 6 in the “For Employers” section states that employers are not required to include the written complaint form with their sexual harassment policy, but should “be clear about where the form may be found, for example, on a company’s internal website.”
- Question 7 in the “Training” section states that only employees who work in New York State need to be trained, but then also states that “if an individual works a portion of their time in New York State, even if they’re based in another state, they must be trained.”
- Question 5 in the “For Employees” section originally took the position that an employer was *required* to inform an “independent contractor” who performs most of his or her work off the premises of the business of the employer’s sexual harassment policy. In the revised FAQs, the Department now states: “Employers are *encouraged* to post and make available their Sexual

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Harassment Prevention policies. You [i.e., the independent contractor] can complain to a supervisor or manager at the employer, file a complaint with the Division of Human Rights, or both.”

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### ENDNOTE

<sup>1</sup> The website is <https://www.ny.gov/programs/combating-sexual-harassment-workplace>.

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