



WEBINAR OVERVIEW

New York State Sexual Harassment Prevention Legal Updates

May 16, 2023

INTRO

- New York State Sexual Harassment Prevention Requirements at a Glance
- New York Labor Law § 201-g – Four (4) year review/update
- Final Updated Model Policy
- What should Employers do now?

MODEL POLICY UPDATES

- Important Changes in Final Model Policy Relating to Sexual Harassment
- Clarification of Where, When, and by Whom Sexual Harassment May Occur
- Addition of Information on Bystander Intervention, Retaliation, and Other Forms of Harassment
- Incorporation of Other Relevant Legislation and Administrative Action Since 2018

MODEL TRAINING UPDATES

HRtelligence TIPS

WEBINAR OUTLINE

I. Intro

A. New York State Sexual Harassment Prevention Requirements at a Glance

What is the law?

New York Labor Law § 201-g

What is the effective date?

October 9, 2018

What does New York Labor Law § 201-g require of NYS employers ?

- (1) Have in place a sexual harassment and workplace-discrimination prevention **policy**;
- (2) Have a **training plan** in place yearly and conduct an **annual** sexual harassment and discrimination prevention **training**; and
- (3) Provide a copy of the policy in writing or by email at the time of hiring and annually during training.

Enforcement and Fines and Penalties

- Enforced by NYS DOL
- The fines for noncompliance start at \$100 per employee for the first violation and goes up from there (fines go up per number of violations such as not training, not providing a sexual harassment prevention policy and not supplying a complaint form with fines being compounded per employee)

B. New York Labor Law § 201-g – Four (4) year review/update

New York Labor Law § 201-g has a provision that every four years the New York Department of Labor (DOL) and New York State Division of Human Rights would evaluate the impact of the current model guidance and policy, and update both as needed. Accordingly, the DOL this year released a proposed model policy on January 12, 2023.

The Final updated model policy was released on April 11, 2023 with updated resources.

C. Final Updated Model Policy

On April 11, 2023, the New York State Department of Labor (NYSDOL) recently released final and significant – substantive changes to New York State’s model sexual harassment prevention policy (the “Final Updated Model Policy”) and RESOURCES. (Effective immediately).

The policy and training materials will look familiar to employers, but there are significant changes. For example:

- the toll free confidential hotline is referenced
- there is discussion on bystander intervention,
- there are updated case scenarios (including those in a remote environment)
- changes address issues such as gender identity, remote work, and bystander intervention.

Importantly, the Final Updated Model Policy explicitly states that it reflects the minimum standard for compliant sexual harassment prevention policies and that “no section in [the Final Updated Model Policy] should be omitted.”

In addition to a new model policy, New York’s “Combating Sexual Harassment” resource page has been changed to include:

- new toolkits for workers and employers,
- updated Frequently Asked Questions,
- new training slide deck and accompanying script and
- other assets that businesses can utilize for employee training purposes to ensure compliance.

D. What Should Employers Do Now?

Since the policy has been revised and the training materials have been updated, employers should:

- Be familiar with the major revisions to the model policy and training
- Update company policies on harassment prevention
- Implement NEW policy
- Translate policy (if applicable)
- Track implementation of new policy
- Update training plan
- Update and use new training materials going forward

II. Final Model Policy Updates

A. Important Changes in Final Model Policy Relating to Sexual Harassment

Expanded Definition of “Sexual Harassment”

“gender-based” discrimination, which includes harassment or discrimination based on sex, sexual orientation, self-identified or perceived sex, gender identity, gender expression, or status of being transgender.

Detailed discussions of gender diversity, gender identity, and gender expression in relation to sexual harassment

- Introducing the gender spectrum
- Defining relevant terms, such as “cisgender,” “transgender,” and “non-binary”;
- providing new examples of harassment related to gender identity and gender expression, including the intentional misuse of an individual’s preferred pronouns,
- applying different expectations for individuals based on their perceived gender identities, or asking individuals to take on traditionally gendered roles.

Final Model Policy moves away from the “severe and pervasive” standard for harassment in 2019

In the policy NYS Labor Law makes clear that the New York State’s lower standard for establishing unlawful harassment is the prevailing standard.

In contrast to federal law, under New York law, *harassment need not be severe or pervasive to be unlawful; rather, the conduct must only subject an individual to inferior terms, conditions, or privileges of employment.*

In other words, unlawful harassment must be more than a “petty slight” or “trivial inconvenience” as “viewed from the standpoint of a reasonable victim of discrimination with the same protected characteristics.”

B. Clarification of Where, When, and by Whom Sexual Harassment May Occur

In a reaction to the shifts in how and where we work since the pandemic, the Final Updated Model Policy

- Protects both in-person and remote employees and hybrid workplaces (online through virtual platforms and messaging apps, on company and personal cell phones, and during or outside of working hours.)
- Protects non-employees and defines “covered individuals” as contractors, subcontractors, vendors, consultants, gig workers, or anyone performing services at the worksite pursuant to a contract with the employer.

C. Addition of Information on Bystander Intervention, Retaliation, and Other Forms of Harassment

Additional points to bystander intervention

These additions to the bystander section are meant to empower third parties to disrupt potential incidents of harassment or discrimination and place the responsibility of harassment in the workplace on all **aware parties**. (not just directly impacted individuals)

The Final Updated Model Policy outlines “five standard methods of intervention” that can be used if employees witness harassment or discrimination:

- A bystander can interrupt the harassment by engaging with the individual being harassed and distracting them from the harassing behavior;
- A bystander who feels unsafe interrupting on their own can ask a third party to help intervene in the harassment;
- A bystander can record or take notes on the harassment incident to benefit a future investigation;
- A bystander might check in with the person who has been harassed after the incident, see how they are feeling and let them know the behavior was not ok; and
- If a bystander feels safe, they can confront the harassers and name the behavior as inappropriate.

Additional responsibilities on supervisors and managers

New language is included in the section regarding “Supervisory Responsibilities” instructing supervisors to be mindful of the impact that harassment and a subsequent investigation has on victims.

Final Updated Model Policy intended to apply to ALL forms of harassment.

While the Final Updated Model Policy focuses primarily on sexual harassment and gender discrimination, the new “Purpose and Goals” and “Conclusion” sections both make clear that the template’s processes and policies **apply equally to harassment and discrimination based on any other legally protected characteristic.**

Note: In recent years, bystander intervention has been an area of focus for the [Equal Employment Opportunity Commission](#), as well as other state and local legislatures. New York City has required bystander intervention training as a part of its harassment training since the law became effective in 2019. [Chicago](#) mandates a separate one-hour bystander intervention training annually. This trend may continue to expand to additional jurisdictions in the future.

D. Incorporation of Other Relevant Legislation and Administrative Action Since 2018

Other key pieces of state legislation and administrative action:

- Three year statute of limitations (from one year) for sexual harassment claims
<https://www.nysenate.gov/legislation/bills/2019/a8421>
- Citing the public release of personnel or employees as a retaliatory action against employees who complain or assist in proceedings involving unlawful discriminatory practices by employers.
<https://www.nysenate.gov/legislation/bills/2021/s5870>

- New York State Division of Human Rights' [sexual harassment hotline](https://www.governor.ny.gov/news/governor-hochul-announces-launch-statewide-workplace-sexual-harassment-hotline), which went live in July 2022 - <https://www.governor.ny.gov/news/governor-hochul-announces-launch-statewide-workplace-sexual-harassment-hotline>
- Prohibits nondisclosure agreements related to discrimination
- Prohibits mandatory arbitration clauses related to discrimination
- Requires employers to provide employees notice of their sexual harassment prevention training program in writing in English (training plan) and in employees' primary languages
 - the employer's sexual harassment prevention policy; and
 - a copy of the information presented at the sexual harassment prevention training (collectively, "Notice"). (This requirement was part of the 2019 amendments to the law).

III. Model Training Updates

Key changes to the model training materials include:

- Instructing employers in the model training script to provide a content warning to those attending training, stating:
 - *"This subject matter can be sensitive or difficult for some employees, including those that might have experienced harassment, discrimination or violence in the past. If the training is being facilitated in a group (whether in person or virtually), trainers should make clear to those attending that anyone needing to step out briefly on behalf of their mental health may do so. All employees do need to complete the training. The employee is allowed to complete the training at a later time if need be."*
- Adding a "What is Gender Identity?" slide using the same language to define gender identity as the model policy.
- Providing that harassing conduct only needs to rise above the level of a "petty slight" or "trivial inconvenience" to be unlawful and explaining that intent does not affect whether conduct is considered harassment.
- Including an exercise that asks participants to identify examples of sex stereotyping from a list of scenarios.
- Providing an overview of the five methods of bystander intervention, which are described in a new section of the model policy.
- Updating the case scenarios, with new examples covering subjects such as the remote work environment and harassment based on gender identity.

Training Materials

Employers are not obligated to use the New York State provided materials and may continue to conduct their own internal training with a tailored in-person or webinar training, or through an online vendor.

Such training will be compliant with New York State requirements provided that the training is interactive, is completed annually, and includes the following minimum components:

Electronic Notices

- Reflecting the “new normal” of more common and frequent remote work arrangements, employers in New York State must now:
 - (i) make notices and posters available electronically through the employer’s website or by email; and
 - (ii) notify employees of such electronic availability.
- This requirement applies to all such notices or posters that are legally required to be distributed and/or posted by federal and/or state law. Notably, this requirement is a supplement to, and not a replacement of, distribution and/or posting requirements in the physical workplace, which remain in place.

The updated New York State materials include:

- An updated model training slide deck ([available here](#));
- An accompanying script ([available here](#)); and
- A YouTube training video ([available here](#)).

Training Still Has To Be Interactive

Notably, while the YouTube video alone meets most New York State minimum training requirements, it is NOT considered interactive. Employers must also:

- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner; or
- Require feedback from employees about the training and the materials presented. (This can be accomplished by using the fillable PDF answer sheet provided by the State OR preparing a quiz and having employees return their answer sheets to the company).