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New York State Issues Updated Guidance on Sex Harassment for Employers

By Barbara E. Hoey and Shea O'Meara

In this article, the authors explain what managers of New York-based employees, regardless of level or location, are expected to know about the new workplace guidelines developed recently by the New York State Department of Labor in conjunction with the New York State Division of Human Rights.

For New York employers, the standards for sexual harassment may be shifting. The state requires all employers to adopt its model sex harassment policy or craft one that equals or exceeds minimum standards. Recently, the New York State Department of Labor (NYSDOL) released a new model policy¹ developed in conjunction with the New York State Division of Human Rights.

This guidance sheds fresh light on how state enforcers are thinking about sexual harassment and employer responsibilities. New York employers beware – while not a statute, the guidance signals a clear and continued shift towards employees. To emphasize the new model, the guidance provides a host of concrete examples to guide employees, companies, and courts alike in deciding when conduct crosses the line into harassment. However, whether or not the judges will adopt the same expansive views as the agencies have, remains to be seen.

This article discusses what employers should know about the new model policy.

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THE MODEL POLICY REFLECTS THE LAW'S LOWERED BAR FOR WRONGDOING

Back in 2019, lawmakers drastically upended the standard for what constitutes sexual harassment by removing the long-standard “severe and pervasive” requirement for conduct to be considered illegal.

Now, the state makes clear that “any harassing behavior that rises above petty slights or trivial inconveniences” can be considered sexual harassment. The policy explains that “there is no single boundary” to determine whether challenged conduct is illegal and the law views wrongfulness based on the standpoint of a reasonable victim with the same protected characteristics. Even more, it instructs that generally “any behavior” where an individual is treated worse because of their actual or perceived gender, sexual orientation, or general expression is a violation. This can include actions that interfere with an individual’s work performance (regardless of intent) and employment decisions including shifts, hours, and project assignments.

Notably, the policy also states that any conduct – even one single instance – can give rise to harassment. In all, this is a much more sweeping approach than in the past.

EXAMPLES, EXAMPLES, EXAMPLES

The policy lists several examples of harassment, which include straight-forward conduct that anyone would recognize as sexual harassment (such as touching, assault, etc.), as well as examples of less overt conduct that would constitute harassment. This includes:

- Remarks about an individual’s gender expression, including remarks about wearing clothing typically associated with a different gender identity or intentionally misusing an individual’s preferred pronouns;
- Asking employees to take on traditionally gendered roles, such as asking a woman to serve refreshments at a meeting; and
- Remarks, jokes, questions, and comments about a person’s sexuality, romantic history, or sexual experience.

The policy also lists examples specifically targeting remote and hybrid workplaces, including:

- Displaying pictures, posters, reading materials, and similar items that are sexually demeaning or pornographic, including during virtual meetings; and

- Making comments over virtual platforms and messaging apps.

A SPOTLIGHT ON GENDER DIVERSITY

The new policy also signals a shift in focus to gender diversity, stating that understanding it is “essential to recognizing sexual harassment.” It states that the “gender spectrum is nuanced” and defines the most common gender identities as cisgender, transgender, and non-binary. Throughout the policy, the NYSDOL makes clear that enforcers will take harassment based on a person’s gender expression seriously.

REVAMPED RETALIATION STANDARDS

The new policy ramps up the retaliation section, signaling that enforcers may be eyeing these claims with more scrutiny and broadening the type of conduct employees should consider retaliatory. It lists several examples of retaliation, including reducing hours, assigning less desirable shifts, publicly releasing personnel files, labeling an employee as “difficult” and excluding them to avoid “drama,” and moving an individual’s desk to a less desirable location. It also addresses conduct that takes place outside of work hours, including disparaging comments on social media.

FOCUS ON BYSTANDER INTERVENTION

One of the most substantive additions is a new section on bystander intervention. It requires supervisors and managers to report harassment when they see it, and encourages other employees to do so as well.

Notably, the policy advises that bystanders interrupt harassment by engaging the individual being harassed, ask a third party to intervene, record or take notes on the incident for future investigation, check-in with the person who has been harassed after an incident, or confront the harassers and identify the behavior as inappropriate.

EXPANDED REFERENCES TO OTHER FORMS OF DISCRIMINATION

In a similar vein, the policy also directly addresses discrimination based on all protected categories (including race, religion, immigration status, and disability). It states that the same reporting and investigation

procedures outlined in the sexual harassment policy will apply to any type of discrimination.

NEXT STEPS FOR EMPLOYERS

This new guidance does not change the law. But, it does set forth clear examples of conduct that will no longer be tolerated. For some employers, this new guidance may mean updating company handbooks and policies. But for all, it should mean taking a close look at current training programs (particularly for managers) and protocols for dealing with sexual harassment.

Managers of New York based employees, regardless of level or location, are now expected to know, understand, and abide by these new guidelines in the workplace.

NOTE

1. https://www.ny.gov/sites/default/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf.

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