

February 27, 2020

**Legal Alert: Keep Up with Changes to New York State and New York City  
Anti-Sexual Harassment and Discrimination Law**

**AMENDED STATE AND CITY LAWS**

New York State and New York City continue to amend existing human rights laws to broaden coverage, facilitate prevention, compensate victims, and punish violations. Highlights of recent laws include:

- **Covered employers:** Effective February 8, 2020, **all** employers in New York State, regardless of the number of employees, will be covered by the New York State Human Rights law. Currently, only organizations with at least four employees are covered by the state's Human Rights Law.
- **Protected workers:** Independent contractors and other non-employee workers, such as interns and contractors working onsite, are now protected against all forms of harassment, not only sexual harassment, under New York State law. It is not clear whether this applies to volunteers. In addition, effective January 11, 2020, independent contractors and freelancers are covered under New York City law.
- **Protected categories:** Both New York State and New York City now prohibit employment discrimination based on the reproductive health choices of applicants, employees, and their dependents. New York State has now joined New York City in prohibiting discrimination against individuals based on their gender identity or expression, as well as racially-associated hairstyles and religiously-required attire and facial hair. Finally, New York State has added non-discrimination and scheduling protections for victims of domestic violence, similar to those which already exist under New York City law.
- **Preventive measures:** New York State now requires employers to distribute its sexual harassment policy and the information presented in the annual harassment training to new hires as well as to all employees during annual training. New York City employers are already obligated to distribute a copy of the New York City Human Rights Commission's fact sheet on sexual harassment to new hires. The fact sheet must also be displayed as a poster.
- **More time to file a complaint:**<sup>1</sup> Currently, employees must file a complaint with the New York State Human Rights Division within one year of the act of which they are complaining. Effective August 12, 2020, covered workers will have three years to file a complaint with the Division. They continue to have the option of filing a lawsuit, rather than invoking the administrative process, within three years. Employees already have three years to file an administrative charge or lawsuit under the City's Human Rights Law for a sexual harassment claim, but one year for all other claims.

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<sup>1</sup> Note that mandatory arbitration of sexual harassment claims is prohibited in New York State, although this may be subject to legal challenge.

- **Fewer employer defenses:** State law no longer requires an employee to show that the harassing conduct was “severe and pervasive,” bringing it in line with city law. Additionally, an employee’s failure to access the employer’s internal process for reporting harassment will no longer automatically result in dismissal of their claim under state law.
- **Nondisclosure agreements:** The state prohibition against non-disclosure provisions in settlement agreements, unless that is the complainant’s preference, has now been expanded to all discrimination claims. Previously, non-disclosure provisions were prohibited only with respect to sexual harassment claims. Claimants opting for a non-disclosure provision nevertheless have 21 days to formally agree to the provision and seven days after that to revoke their agreement. Additionally, effective January 1, 2020, New York State prohibits employee agreements not to disclose the factual basis for any future discrimination claim, unless the agreement informs employees that they are not prohibited from contacting law enforcement, government agencies, or an attorney.
- **Increased damages:** New York State law now provides that successful discrimination claimants may recover punitive damages and attorney’s fees, as is already the case under city law.

## ONGOING COMPLIANCE: POLICIES AND TRAINING

### New York State Mandatory Sexual Harassment Prevention Policy

All New York State employers must maintain a sexual harassment policy which contains certain provisions. The New York State [Department of Labor](#) (DOL) and [Division of Human Rights](#) (DHR) have published a model sexual harassment prevention policy: <https://www.ny.gov/combating-sexual-harassment-workplace/employers>. Every employer in the state is required to adopt and distribute in writing<sup>2</sup> either the State’s model policy, or its own policy that equals or exceeds the model’s standards. The state’s model policy includes:

1. an explanation of sexual harassment with examples of unlawful harassment;
2. Federal and State statutory provisions and remedies;
3. an explanation of the procedure for the timely and confidential investigation of complaints; and
4. a standard complaint form.

Employers who wish to adopt their own policy must include certain required provisions, such as an anti-retaliation clause. The required provisions can be found here:

<https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf>

The policy may be distributed electronically as long as employees have access to a computer and a printer. While a written acknowledgement by each employee who receives the policy is not legally

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<sup>2</sup>If employees speak a language other than English, materials must be distributed in their language if the state has prepared a translation. Translations are available for the following languages: Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish, and Haitian-Creole. Otherwise, materials may be in English.

required, employees should be “encouraged” to submit one. Because the policy is rather long – seven pages, employers should consider distributing this as a stand-alone policy rather than incorporating it into an employee handbook.

The state has also created a model written complaint form:

<https://www.ny.gov/combating-sexual-harassment-workplace/employers>. The model form makes clear that employers need not adopt this, or any, written complaint form and that employees should be allowed to make a formal complaint of harassment in whatever way is most comfortable for them. Any form that is adopted should be attached to the policy.

More details about maintaining a legally compliant policy can be found here:

<https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers>

## **New York State and New York City Anti-Sexual Harassment Training Programs**

### **NYS Training Requirements**

All employees, including part time and temporary employees, must receive anti-sexual harassment training annually. Employers may adopt any twelve-month period such as the calendar year, or the employee’s anniversary date, for the annual training. NYS DOL and DHR have published a model interactive sexual harassment training program, which includes a script, a PowerPoint, examples of harassment, and a video. Note that this training covers gender as well as sexual harassment:

[https://www.ny.gov/combating-sexual-harassment-workplace/employers \(training requirements\)](https://www.ny.gov/combating-sexual-harassment-workplace/employers (training requirements))

Every employer in the State, regardless of its size, must either adopt the model program or establish one that equals or exceeds the minimum standards set forth in the model program. The NYS training program or its equivalent must:

- be given to all employees annually;
- explain sexual harassment and provide examples;
- address supervisor responsibilities;
- provide Federal and State statutory provisions and remedies; and
- explain the means of redress available to employees.

The training must be interactive. “Interactive” means that there must be some opportunity for employee participation, which may be accomplished by any of the following:

- Be web-based with questions asked of employees as part of the program;
- Accommodate questions asked by employees;
- Include a live trainer made available during the session to answer questions; and/or
- Require feedback from employees about the training and the materials presented.

### **NYC Training Requirements**

Additionally, all New York City employers with 15 or more employees<sup>3</sup> will be required to provide all employees (including interns, supervisory, and managerial employees AND independent contractors who work at least 80 hours and 90 days, which need not be consecutive, in a calendar year) with an annual training regarding sexual harassment, and to retain records to show that all employees met the training requirement. Employers need not train employees and independent contractors who provide proof of completion of a prior sexual harassment prevention training if completed within the past year.

The training - which, in addition to the NYS training requirements, must include information on internal and local complaint processes as well as explain, with examples, bystander intervention and the prohibition of retaliation - is based on guidelines determined by the [New York City Commission on Human Rights](#) and must:

1. be given as soon as possible after hiring a new full- or part-time employee who works more than 80 hours and at least 90 days in a calendar year;
2. be interactive (though it need not be live or facilitated by an in-person instructor); and
3. be available to the NYC CHR upon request. Employers may but need not develop their own trainings. The Commission has developed an online free training that meets both the NYC and NYS training requirements. At the end of the training, the user will receive a certificate that employers can retain as proof of training completion.

<https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page>

### **NYC Employers Sexual Harassment Information Sheet**

All NYC employers are required to post an anti-sexual harassment poster in English and Spanish that explains employee rights and responsibilities, as well as distribute a written information sheet on sexual harassment. The NYC CHR has made the poster and information sheet available here:

[https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass\\_Factsheet.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf)

### **WHAT NONPROFITS SHOULD DO NOW:**

1. Download the NYC poster and exhibit it in a place where employees can see it.
2. Update your employment policies to include all new protected categories.
3. Download the NYC fact sheet and give it to new hires; although apparently not legally required, you may also give it to current employees.
4. Review your harassment policy to make sure it complies with state and city law. Make sure the policy includes internal complaint procedures, a non-retaliation provision, and information about the federal, state, and city agencies administering laws prohibiting sexual harassment.

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<sup>3</sup> Note that independent contractors – regardless of the number of days or hours they work – are counted as employees for the purposes of determining whether an employer has 15 employees and is obligated to provide the annual sexual harassment training.

5. Ensure that all employees, interns, and independent contractors who work more than 80 hours and 90 days in a year receive sexual harassment training annually. Because of their heightened obligations, supervisory employees should be trained separately from other employees.

6. Consider revising independent contractor agreements to require independent contractors who work more than 80 hours and 90 days in a year to provide proof of completion of a sexual harassment prevention training before payment of the first invoice.

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