



Division of Human Rights

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GUIDANCE ON SEXUAL HARASSMENT FOR ALL EMPLOYERS IN NEW YORK STATE

STATUTORY REQUIREMENTS

Sex discrimination is unlawful pursuant to the New York Human Rights Law § 296.1 (codified as N.Y. Executive Law, Article 15), and the federal Civil Rights Act of 1964, Title VII (codified as 42 U.S.C. § 2000e et seq.). The Human Rights Law applies generally to employers with four or more employees. Federal Title VII applies to employers with 15 or more employees.

Sexual harassment is a form of sex discrimination. ***Every*** employee in the State of New York is entitled to a working environment free from sexual harassment. The provisions of the Human Rights Law generally apply to employers with four or more employees.

However, with regard specifically to ***sexual harassment***, the Human Rights Law was amended in 2015 to apply to ***all*** employers, regardless of the number of employees. For sexual harassment occurring on or after January 19, 2015, the effective date of the amendment (Laws of 2015, chapter 363), a complaint may be filed under the Human Rights Law against employers with any number of employees, including those with fewer than four employees. Also, all domestic workers are protected from sexual harassment, and harassment on the basis of gender, race, national origin or religion.

THIS GUIDANCE

This Guidance is intended to fulfill the requirement of the Laws of 2015, chapter 362, directing that the Department of Labor and the Division of Human Rights

shall make training available to assist employers in developing training, policies and procedures to address discrimination and harassment in the workplace including, but not limited to issues relating to pregnancy, familial status, pay equity and sexual harassment. Such training shall take into account the needs of employers of various sizes. The department and division shall make such training available through, including but not limited to, online means. In developing such training materials, the department and division shall afford the public an opportunity to submit comments on such training.

This Guidance is available on the Division of Human Rights website, www.dhr.ny.gov, or by calling the Division at 888-392-3644, and on the Department of Labor's website, www.labor.ny.gov, or by calling the Department of Labor at 888-469-7365.

WHAT IS SEXUAL HARASSMENT?

Sexual harassment in the form of a "hostile environment" consists of words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual's sex. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, or which interfere with the recipient's job performance.

A type of sexual harassment known as "quid pro quo" harassment occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms conditions or privileges of employment. Only supervisors and managers are deemed to engage in this kind of harassment, because co-workers do not have the authority to grant or withhold benefits.

Sexual harassment can occur between males and females, or between persons of the same sex. Sexual harassment that occurs because the victim is transgender is also unlawful.

A single incident of inappropriate sexual behavior may be enough to rise to the level of sexual harassment, depending on the severity of such incident. The law requires that the behavior be severe or pervasive, so that one joke or comment may not be enough to be sexual harassment. However, the courts have held that a single incident could be considered sexual harassment, depending on the circumstances.

See further below, the section on Descriptions and Examples of Sexual Harassment.

WHEN IS THE EMPLOYER LIABLE FOR SEXUAL HARASSMENT?

Employers are strictly liable for harassment of an employee by an owner or high-level manager. This means if one owner or manager harasses an employee, even without the knowledge of the other owners or managers, the employer is nevertheless legally responsible.

Employers may be strictly liable for harassment by a lower-level manager, or by a supervisor if that supervisor has a sufficient degree of control over the working conditions of the victim. This means that the employer may be legally responsible for such harassment, even if no owner or manager knew about it. See further below, on how such liability may be avoided by having a sexual harassment policy, and using it effectively.

Employers may be liable for the harassment of an employee coworkers, if the employer knew or should have known about the harassment. This means the employer will be liable if the employer was negligent about preventing or stopping harassment.

Furthermore, if an employee complains of harassment to any supervisor or manager, the knowledge of the supervisor or manager will be considered to be the knowledge of the employer. Therefore it is very important that the employer have a sexual harassment policy that requires supervisors and managers to report any complaint of sexual harassment, and any possible harassment that comes to their attention for any reason. See further below Employer Policy on Sexual Harassment.

RETALIATION IS UNLAWFUL

It is unlawful for any employer, or any agent or employee of the employer, to retaliate against an employee who has complained of sexual harassment.

The Human Rights Law protects any individual who has engaged in “protected activity.”

Protected activity occurs when a person has

- filed a formal written complaint of sexual harassment, either internally with management or human resources, or with any anti-discrimination agency,
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law,
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment,
- complained that another employee has been sexually harassed, or
- encouraged a fellow employee to report harassment.

(For employers with four or more employees, retaliation also applies to opposition to any other actions forbidden by the Human Rights Law.)

If the employee has participated in a proceeding before the Division of Human Rights, or in a court of law, that complainant or witness is absolutely protected against retaliation for any oral or written statements made to the Division or a court in the course of proceedings, regardless of the merits or disposition of the underlying complaint.

Even if the alleged harassment does not turn out to rise to the level of a violation of the Human Rights Law, the individual is protected if he or she had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

WHAT IS RETALIATION?

Retaliation consists of an adverse action or actions taken against the employee by the employer. The action need not be job-related or occur in the workplace. Unlawful retaliation can be any action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of harassment or any other practices forbidden by the Law. Actionable retaliation by an employer can occur after the individual is no longer employed by that employer. This can include giving an unwarranted negative reference for a former employee.

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to make a claim of retaliation, the individual must be able to substantiate the claim that the adverse action was retaliatory.

HAVING AN EFFECTIVE SEXUAL HARASSMENT POLICY

Having a policy that recognizes that sexual harassment is unlawful, and that signals to all persons in the organization that sexual harassment will not be tolerated, is an important step in limiting the employer's liability by

- preventing sexual harassment,
- providing a means for employees to alert management if sexual harassment is occurring,
- providing for investigation of all allegations of sexual harassment, and
- providing for prompt and effective corrective action to be taken when sexual harassment has occurred.

Employers may avoid legal responsibility for sexually harassing actions by lower-level managers, supervisor and coworkers if they

- provide employees with a reasonable opportunity to complain of harassment, and
- take prompt and effective corrective action to stop the harassment once it is reported, or otherwise known about.

This means that the employer should have a policy, as explained more fully below in the section on Employer Policy on Sexual Harassment, that

- advises employees that sexual harassment is against the employer's workplace policy and will not be tolerated,
- tells employees to whom they can complain if they are a victim, or if they see harassment of others,
- assures employees that they will not be retaliated against for complaining, and
- indicates that all complaints will be investigated and dealt with appropriately.

An employer may still be liable, however, if they have a history of not following their own policy, such as by taking no action to stop harassment once they know of the harassment. Such failure to enforce the anti-harassment policy may signal to employees that complaining is futile, and the employer may become liable for all harassing conduct, regardless of whether owners or managers knew it was happening, or had a policy that purported to prevent sexual harassment.

RECOMMENDED CONTENT OF EMPLOYER POLICY ON SEXUAL HARASSMENT

A Policy on Sexual Harassment should contain the following statements:

- the employer is committed to maintaining a workplace free from sexual harassment
- sexual harassment is unlawful and subjects the employer to liability
- any possible sexual harassment will be investigated whenever management receives a complaint or otherwise knows of possible sexual harassment occurring
- those who engage in sexual harassment will be subject to disciplinary action

The Policy should also contain information:

- explaining and defining sexual harassment, so that employees will know what actions are prohibited (see further below section on Descriptions and Examples of Sexual Harassment)
- encouraging employees to complain of sexual harassment that they experience or know about
- indicating to whom employees can complain about sexual harassment (this should, particularly with smaller employers, include all owners and managers, or otherwise provide open access for employee complaints)
- requiring employees to cooperate with management during any investigation of sexual harassment
- requiring all supervisory and management staff to report any complaint that they receive, or any harassment that they observe (supervisor or manager's knowledge of sexual harassment may create liability for the employer)

DESCRIPTIONS AND EXAMPLES OF SEXUAL HARASSMENT

For the legal definition of sexual harassment, see the above section What is Sexual Harassment? Further descriptions and examples include the following.

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when:

- Such conduct is made either explicitly or implicitly a term or condition of employment,
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment; or

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the complaining individual is not the intended target of the sexual harassment.

The following describes some of the types of acts that may be unlawful sexual harassment:

- Physical assaults of a sexual nature, such as:
 - Rape, sexual battery, molestation, or attempts to commit these assaults.
 - Intentional or unintentional physical conduct which is sexual in nature, such as touching, pinching, patting, grabbing, brushing against another employee's body, or poking another employees' body.
- Unwanted sexual advances, propositions or other sexual comments, such as:
 - Requests for sexual favors accompanied by implied or overt threats concerning the victim's job performance evaluation, a promotion, or other job benefits or detriments;
 - Subtle or obvious pressure for unwelcome sexual activities;
 - Sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience which are sufficiently severe or pervasive to create a hostile work environment.
- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
 - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials, or other materials that are sexually demeaning, pornographic.