



Revising and Updating EEO/Sexual Harassment and Harassment Prevention Policies

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PUTTING IN PLACE STRATEGIES TO CREATE A CULTURE OF RESPECT AND MINIMIZE LIABILITY

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I. REVISING AND UPDATED EEO/SEXUAL HARASSMENT AND HARASSMENT PREVENTION POLICIES

- Policies should prohibit behavior which is threatening, disturbing and/or beyond that which a reasonable person would likely to find objectionable
- Policies should support in writing equal employment opportunity and diversity
- Employer should urge employees to treat others professionally and respectfully
- Policies should be committed to a workplace free of bias, prejudice and harassment
- Policies should reinforce compliance with all laws
- Policies should be encouraged to respect each other's differences and treat one another with dignity

A. EEO Policy

- Should state that the employer provides for equal employment opportunities in all aspects of the employment relationship, including recruitment, hiring, compensation, training, promotion, transfer, discipline, layoff and termination;
- Should state that the employer is committed to providing a work environment free of unlawful discrimination; and
- Should state that the employer prohibits discriminatory treatment based upon race, color, age, sex, religion, national origin, marital status, disability, sexual orientation, veteran status or other status, retaliation protected by federal, state or local laws.

B. Harassment Policy

- The Company is committed to providing its employees with a work environment that is free of discrimination, including harassment, on the basis of any legally protected status.
- The Company expressly prohibits any form of unlawful harassment against any employee.
- The Company will enforce its policy against harassment at all levels within the workplace.

- Every employee must avoid any conduct that could reasonably be interpreted as harassment that is prohibited by the policy.
- All managers and supervisors are responsible for being aware of and preventing potentially discriminatory or harassing situation.
- All employees should be encouraged to endeavor to protect other employees from unlawful harassment and maintain a work environment from unlawful harassment and intimidation.

C. New York State Anti-Harassment Legislation

On April 12, 2018, Governor Cuomo signed a new budget bill which imposes new requirements on employers in New York State regarding sexual harassment. Those new laws, requirements and effective dates are as follows:

- Effective Immediately – Employers are now liable for sexual harassment to non-employees such as contractors, subcontractors, vendors, consultants and other persons providing services.
- July 11, 2018 – New requirements for settlement agreements and employment agreements regarding sexual harassment, including no mandatory nondisclosure requirements and no mandatory arbitration provisions.
- October 9, 2018 – Mandatory distribution of written anti-harassment workplace policies and mandatory annual training for all employees.
- January 1, 2019 – Mandatory written confirmation by bidders for certain government contracts regarding written sexual assault policy and annual training of all employees.

D. New York City New Harassment Legislation

On April 29, 2018, Mayor DeBlasio announced that New York City will hold public hearings on the eleven new bills passed by the New York City Council regarding sexual harassment on April 11, 2018.

The New York City legislation requires all employers with fifteen or more employees to conduct annual sexual harassment training; extends sexual harassment protections to all employers regardless of size; extends statute of limitations for sexual harassment claims to three years; requires display of a city designed anti-sexual harassment poster; requires contractors to include confirmation of anti-sexual harassment policies in their applications for city business and requires city agencies to report incidents of workplace harassment.

The effective dates of this new legislation range from 120 days after signing for posting requirements to April 19, 2019 for mandatory training.

E. Federal Tax Cuts and Jobs Act passed December 2017

- Section 13307 of Tax Cuts and Jobs Act passed in December 2017 prohibits deductions for settlement payments, attorneys' fees and expenses related to sexual harassment or sexual abuse claims if the settlement payment is subject to a nondisclosure agreement

F. New Proposed Laws

- Ending forced arbitration of Sexual Harassment Act of 2017 – new proposed federal bill
- New proposed rules and laws regarding reporting and government payments for sexual harassment settlements
- New EEOC sexual harassment guidance pending

II. WHAT CAN AN EMPLOYER DO TO PREVENT WORKPLACE HARASSMENT AND DISCRIMINATION?

- Establish rules and policies to ensure that all employees are treated fairly and equally
- Encourage all employees to respect and embrace their differences
- Encourage employees to confide in supervisors or management when rules or policies are breached
- Establish procedures to report if there is unfair or unequal treatment
- Establish a complaint procedure to report harassing or discriminatory treatment
- Create workplace policies addressing discrimination, harassment and retaliation
- Create an atmosphere that recognizes each person as an individual
- Require that everyone be treated with respect and courtesy
- Request that supervisors be aware of and try to correct biases in themselves and their employees
- Request that supervisors stop people when they joke about or put down others

III. ELEMENTS OF AN EFFECTIVE COMPLAINT PROCEDURE

- There is an obligation that employees take advantage of the established complaint procedure.
- Employees are strongly encouraged to report any incident of harassment, discrimination or retaliation promptly.
- Complaints should be filed with a designated person; either in the Human Resources Department or a specific manager or supervisor.
- Employees must provide clear details about the incident; be prepared to be interviewed and provide witnesses, and participate fully in the investigation.

- If an employee tells the offender that the behavior is unwelcome and he/she should discontinue it.
- Conduct a thorough investigation
- Make a final report of the investigation and issue conclusions
- Communicate and implement decisions after the investigation is complete
- Maintain confidentiality where appropriate

IV. RETALIATION

- Adverse actions (such as firing, demoting or harassing) taken against an employee for filing in good faith a charge of discrimination on behalf of themselves or another or participating in a discrimination proceeding are prohibited
- Employers should expressly state in writing that they do not permit, condone or approve of retaliation

V. CHANGES DUE TO “ME TOO” MOVEMENT

A. Employers revising, updating, modifying and reaffirming policies regarding:

- Repeat offenders
- Minor infractions
- Assessment of legal liability, reputational and business risks of such behavior
- Some employers, such as Microsoft and some large law firms have eliminated forced confidential arbitration agreements
- Other organizations, such as the Screen Actors Guild, have written a clear code of prohibited conduct and behavior
- Some employers, like New York University, have banned all romantic relationships between supervisors and those who report to them, as well as between faculty and students
- Some cities, like Seattle, have imposed new rules of behavior for places such as construction sites
- Other employers have implemented anonymous employee surveys or hotlines and/or third parties
- Increased harassment and EEO training
- Mandatory sexual harassment training is required or proposed by laws in California, Connecticut, Maine, New York, New York City and other municipalities. New York State law requires annual mandatory training for all employees and training requirements to be developed by New York State.

- Training must include (1) an explanation of sexual harassment; (2) examples of conduct that would constitute unlawful sexual harassment; (3) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims; (4) information concerning employees' rights of redress and all available forums for adjudicating complaints and (5) the conduct and additional responsibilities for supervisory personnel
 - Companies reviewing prior settlements and policies regarding sexual harassment in connection with mergers, acquisitions and investments
- B. Proposed bans on secret sexual harassment settlements and nondisclosure agreements have been raised in proposed federal legislation and legislation in states, such as New Jersey, New York and Washington
- C. Executive pay and benefits linked to compliance with harassment policies

VI. RECENT HEADLINES AND CASES

- April 18, 2018 – Ernst & Young tax partner alleges sexual assault by male colleague at a restaurant bar during a work conference and alleges no response by employer
- Starbucks closes 8,000 stores for racial bias training
- Employee alleges co-worker licked her ear and after she complains, she is placed on a performance improvement plan and later fired. *Phillips v. Caris Life Sciences* 2017 WL 5987751 (5th Cir 2017)
- Employee who participated in EEOC interviews and witnessed alleged improper sexual contact, fired one month later, alleges retaliation. *Robinson v. Jackson State University* 2017 WL 6003389 (5th Cir 2017)
- Court of Appeals holds that police offer could go to trial due to termination allegedly resulting from off duty affair with a fellow officer. *Perez v. City of Roseville* 9th Cir (2/9/18)
- Steven Cohen's investment firm denied bid to seal sex discrimination claims despite confidentiality agreement and arbitration agreement. *Bonner v. Point 72 Asset Management LP* (SDNY Feb. 20, 2018)
- Punitive damages for sexual harassment broader under New York City law than federal law. *Chauca v. Abraham* (New York Court of Appeals Nov. 20, 2017)
- Transfer of police officer after sexual harassment complaints supports jury verdict of retaliation *MVS v. Michigan State Dept. of Police* 130 FEP Cases 1429 (6th Cir March 28, 2018)
- 17% of EEOC sexual harassment charges were filed by men
- Retaliation charges account for nearly 50% of all EEOC charges in 2017

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