

COMPLIANCE BULLETIN

HIGHLIGHTS

- A state law requires all New York employers to adopt policies and training programs to prevent sexual harassment.
- The state has issued a final model policy and training program for employer compliance with the new law.
- The state also issued other guidance for employers.

IMPORTANT DATES

October 9, 2018

Deadline for employers to adopt a written sexual harassment prevention policy and training program and to distribute the written policy to all employees.

October 9, 2019

Deadline for employers to provide training to all employees.

Provided By:

Associates of Glens Falls Inc.

New York State Issues Final Sexual Harassment Models

OVERVIEW

The New York Department of Labor ([NYDOL](#)) has issued [final models](#) for the written policy and training program on preventing workplace sexual harassment that the state's [2019 budget](#) law requires all employers in the state to adopt **by Oct. 9, 2018**.

The final models, released on Oct. 1, 2018, contain standards that employers must either meet or exceed to comply with the new law.

ACTION STEPS

Every employer in New York should:

- ✓ Adopt the NYDOL's [model written policy](#) (or a written policy that meets or exceeds the NYDOL's [minimum policy standards](#)) and ensure that its employees receive a copy of it **on or before Oct. 9, 2018**; and
- ✓ Adopt the NYDOL's [model training program](#) (or a program that meets or exceeds the NYDOL's [minimum training standards](#)) and ensure that its employees receive the training **by Oct. 9, 2019**.



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Overview

New York's 2019 budget law, enacted on April 12, 2018, amended several of the state's labor and other employment-related laws to provide increased protections against sexual harassment in the workplace.

Effective Oct. 9, 2018, the amendments require **every employer in the state** to:

- ✓ Adopt a written sexual harassment prevention policy;
- ✓ Provide the written policy to all employees; and
- ✓ Conduct annual sexual harassment prevention training for employees.

Under the budget law, an employer's written policy and training program on sexual harassment must meet or exceed standards set forth in models issued by the NYDOL.

NYDOL Final Models and Guidance

In August 2018, the NYDOL issued draft models for the budget law's required policy and training program. The NYDOL then issued **final** versions of these materials, as listed in the table below, on Oct. 1, 2018.

| Final Models | |
|---|--|
| Written Policy | Training Program |
| <ul style="list-style-type: none">✓ Fact sheet on the budget law's minimum written policy standards;✓ Model written policy on sexual harassment prevention (in both Word and PDF formats); and✓ Model complaint form for workplace sexual harassment claims (in both Word and PDF formats). | <ul style="list-style-type: none">✓ Fact sheet on the budget law's minimum training program standards;✓ Model training program guide (in both Word and PDF formats);✓ General training presentation (in both PowerPoint and PDF formats); and✓ Presentation on sexual harassment case studies (in both PowerPoint and PDF formats). |

Along with the final models, the NYDOL issued new guidance materials for employers. These materials include:

- ✓ A sexual harassment prevention [employer toolkit](#);
- ✓ A model [workplace poster](#) on sexual harassment prevention, which is an optional tool for directing employees and others to an employer's sexual harassment prevention policy; and
- ✓ Final [FAQs](#) about the budget law's workplace sexual harassment provisions, including those that, as of **July 11, 2018**, make it illegal for employers to include any:

COMPLIANCE BULLETIN

- ✗ Nondisclosure requirements within any settlement or other agreement to resolve a sexual harassment claim, unless the complainant prefers to include one; or
- ✗ Mandatory arbitration requirements for sexual harassment claims within any written contract.

NYDOL Final Model Written Policy

In general, the NYDOL's final model written policy follows the framework of minimum requirements set forth in the budget law. However, the final model includes certain details that the law does not specifically address. It also contains certain differences from the NYDOL's previously released draft model policy. For example, the final model policy states that:

- ✓ It applies **not only to all employees**, but also to job applicants, interns (paid or unpaid), contractors and any other person conducting business with the employer, **regardless of their immigration status** (the draft did not mention immigration status in the context of how the policy applies);
- ✓ It must be provided to new employees **upon hiring**;
- ✓ It **should be** posted prominently in all work locations to the extent practicable (the draft would have required employers to post their written policies);
- ✓ Supervisors and managers **are required** to report any complaint they receive or any harassment they observe **or become aware of** to a person designated by the employer (while the draft included the mandatory reporting requirement, it did not specify, as the final version does, that mandatory reporting applies to behavior that a manager or supervisor merely becomes aware of); and
- ✓ An investigation of any complaint, information or knowledge of suspected sexual harassment must be started immediately and **completed as soon as possible** (the draft would have required investigations to be completed within 30 days).

The final model policy also includes three new provisions that did not appear in the draft model. The first is a new footnote indicating that, although the policy specifically addresses sexual harassment, New York law also prohibits harassment and discrimination based on other protected traits. The second is a paragraph about sex stereotyping as an example of sexual harassment. The third is a paragraph indicating that the law's prohibition against retaliation applies even if alleged harassment does not turn out to rise to the level of a legal violation.

The draft and final model policies both outline a series of steps for employer investigations of sexual harassment claims. While the draft indicated that investigations must be done in accordance with these steps, the final model states that the investigation process **may vary from case to case** and that investigations should follow the listed steps. These steps include:

- Conducting an immediate review of the allegations and taking any interim actions, such as instructing the respondent to refrain from communications with the complainant;

COMPLIANCE BULLETIN

- ❑ Completing or encouraging the complainant to complete a written complaint form;
- ❑ Preserving relevant documents and other evidence;
- ❑ Documenting the investigation in writing; and
- ❑ Informing the complainant of the final determination, any corrective actions taken, and his or her right to file an external complaint or charge.

The NYDOL's final FAQs also contain guidance relating to employers' written policies. Specifically, the FAQs:

- ✓ Encourage, but do not require, employers to obtain a signed acknowledgment of receipt from employees; and
- ✓ Allow employers to provide their written policies to employees in electronic form, as long as they can access it on an employer-provided computer during work time and print a copy for their records.

NYDOL Final Model Training Program

Like the final model written policy, the NYDOL's final model sexual harassment prevention training program includes and expands on the budget law's minimum requirements. Under the law, an employer's training program must be interactive and include certain provisions.

The NYDOL's final model program defines the term "interactive" as requiring some level of **feedback** (rather than "participation," as used in the draft) by those being trained. It specifies that the training may be presented to employees individually or in groups, in person, via phone or online, or via webinar or recorded presentation. It also states that an employer's training program should have as many of the following elements as possible:

- ✓ Ask questions of employees as part of the program;
- ✓ Accommodate questions asked by employees, with answers provided in a timely manner; and
- ✓ Require feedback from employees about the training and materials presented.

This list excludes one of the elements that was listed in the draft, which was to include a live trainer who is available to answer questions during the training session. The final model and FAQs both confirm that while having a live trainer is a best practice, in-person training is **not** required.

The final model program also includes other requirements that are different from those contained in the draft model and not articulated in the budget law. Specifically, the final model states that:

- ✓ All current employees must complete the initial required training **by Oct. 9, 2019** (this is an extension from the Jan. 1, 2019, deadline initially set forth in the draft);

COMPLIANCE BULLETIN

- ✓ All new employees should complete the training **as quickly as possible** (under the draft, training would have been required within 30 calendar days after a new employee starts his or her new job).

Finally, the NYDOL's final FAQs make clear that **all employees** must receive the required training by the Oct. 9, 2019, deadline, **regardless of:**

- ✗ Their immigration status;
- ✗ Whether they are exempt from overtime requirements; and
- ✗ Whether they work part time or on a seasonal or temporary basis.

FAQs on Nondisclosure and Arbitration Clauses

The NYDOL's FAQs on the budget law's other sexual harassment provisions essentially just restate the budget law's language on these topics. However, the final FAQs specify that the new law's prohibition against **nondisclosure clauses** in sexual harassment settlements takes away the authority of employers to include, **or even agree to include**, any term or condition that would prevent the disclosure of the underlying facts and circumstances of the claimed sexual harassment, unless the condition of nondisclosure is the preference of the person who complained.

The FAQs also summarize the law's definition of a **mandatory arbitration clause** as a requirement in any written contract that:

- ✓ When faced with contract disputes, compels parties to seek arbitration before going to court; and
- ✓ Makes facts found at arbitration final and not subject to review by the courts.

Considerations for Employers in New York City

In addition to the state budget law's new requirements, a local law enacted by New York City in May 2018 requires **employers in New York City that have 15 or more employees** to provide sexual harassment training to each new employee after 90 days of employment and to all employees on an annual basis. These and related requirements under the city's new **Stop Sexual Harassment in New York City Act** go into effect on **April 1, 2019**. Employers should become familiar with all applicable state and local laws to ensure that their sexual harassment prevention policies, training programs and other workplace policies comply with all requirements by the appropriate deadlines.