

Shining a Light: New York's Response to the Dawn of the #MeToo Movement

By Cara E. Greene and Lauren McGlothlin

Introduction¹

In October 2017, following allegations of sexual misconduct against a famous Hollywood producer, what had been trending as the hashtag #MeToo quickly manifested into a political and social movement condemning sexual harassment and assault across the country. In the first 24 hours of its usage, #MeToo had been used in 12 million posts on Facebook, and in half a month, #MeToo had been used more than 500,000 times on Twitter.² Across the nation, and even globally, individuals began to shine a spotlight on a pervasive and longstanding culture of sexual harassment.

While the #MeToo movement originally gained traction in the entertainment world, it quickly spread to other industries, including the legal profession.³ As of the one-year anniversary of the #MeToo movement, more than 425 prominent people in industries ranging from financial services to entertainment have been publicly accused of sexual misconduct.⁴ Of course, this number only includes sex-related allegations that have been reported in the public record, trade publications, and national, state, and local media.

Despite the growing movement to denounce it, sexual harassment continues to pervade the workplace. In 2015, a study conducted by the Equal Employment Opportunity Commission (EEOC), the federal agency administering and enforcing laws against workplace discrimination and retaliation, found that 45 percent of the total number of charges the agency received from employees working for private or state and local governments contained claims of sexual harassment.⁵ That number has likely dramatically increased since the beginning of the #MeToo movement. The EEOC recently released preliminary data for fiscal year 2018, finding that EEOC charges alleging sexual harassment increased from fiscal year 2017 by more than 12 percent, and the EEOC filed 66 harassment lawsuits—41 of which included allegations of sexual harassment—which was more than a 50 percent increase in sexual harassment suits during fiscal year 2017.⁶

As of October 2018, at least 12 states have passed laws relating to sexual harassment in response to the #MeToo movement.⁷ While New York State and New York City have long had laws prohibiting sexual harassment in the workplace and providing robust remedies for those who have been subjected to sexual harassment,⁸ both



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have revisited those laws in 2018 and have added requirements for employers to finalize workplace policies, conduct employee trainings, and disseminate related information in their workplaces, among other things. This article summarizes these changes to the law.

New York State's Combating Sexual Harassment in the Workplace Policy

On April 12, 2018, Governor Cuomo signed into law the 2019 New York State Budget, which also provided a sweeping overhaul of the State's sexual harassment laws ("State Law").⁹ The State Law, which covers all employees and non-employees, including independent contractors, subcontractors, consultants, and vendors,¹⁰ among other things, requires employers to adopt policies and trainings related to sexual harassment. On October 1, 2018, the New York State Department of Labor (DOL), in consultation with the NYSDHR (collectively, "the State"), released final guidance regarding the amended State Law on sexual harassment.

Under the State Law, by October 9, 2018, employers were required to adopt the model sexual harassment prevention policy or establish their own workplace policy that "equals or exceeds" the minimum standards provided by the State and provide their employees with a written copy of the adopted policy, in the language spoken by those employees.¹¹ The minimum standards are:

1. Prevent sexual harassment consistent with the State guidelines;
2. Give examples of conduct that would constitute unlawful sexual harassment;
3. Provide employees with information regarding the federal and state statutes on sexual harassment and the remedies available under those laws, as well as a statement drawing attention to relevant local laws;
4. Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints judicially and administratively;
5. Include a complaint form for employees to fill out;
6. Provide a procedure for complaints to be timely and confidentially investigated, and which will allow for due process;

7. Note that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as against managerial and supervisory personnel who knowingly permit this behavior to continue; and
8. Provide that retaliation against individuals who make sexual harassment complaints or testify in any proceeding or investigation regarding sexual harassment is unlawful.¹²

Further, employers must provide employees with sexual harassment prevention training on an annual basis and in the language spoken by the employees. Such trainings must equal or exceed the following minimum standards provided by the State:

1. Be interactive;
2. Describe sexual harassment pursuant to the guidance issued by the State;
3. Provide examples of conduct that would be considered sexual harassment;
4. Include information about the federal and state statutes regarding sexual harassment and remedies available to sexual harassment victims;
5. Provide information about rights of redress and forums for adjudicating sexual harassment complaints; and
6. Include information pertaining to supervisors' responsibilities and conduct.¹³

The State has created and published a model sexual harassment policy (as well as materials for employers to use in their own creation of a mandatory policy), a model sexual harassment prevention training program, and a model sexual harassment prevention policy. These models, which include documents establishing the minimum standards for both the program and the policy, as well as a complaint form, a compliance toolkit, a poster, and a FAQ, are now available online.¹⁴

Additionally, the State Law amended the New York Civil Practice Law and Rules (CPLR) in two important ways: CPLR 7515 prohibits all New York State employers from requiring employees to sign "mandatory arbitration clauses" for sexual harassment claims, and makes such "prohibited clauses" null and void within contracts entered into on or after July 11, 2018.¹⁵ CPLR 5003-b and the New York State General Obligations Law § 5-336 also now prohibit employers from including non-disclosure provisions in agreements settling sexual harassment claims and litigation, unless the complaining party requests or agrees to confidentiality.¹⁶ The complainant's preference for confidentiality must be memorialized in an agreement signed by the parties and if a non-disclosure agreement is part of a settlement agreement, the individual must consider the agreement for 21 days and have seven days to revoke the agreement.¹⁷

New York City's "Stop Sexual Harassment in NYC" Act

On May 9, 2018, Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act ("City Act") into law, codified as Local Laws 95 and 96 of 2018, and amending the NYCHRL.¹⁸ The City Act increased the statute of limitations for individuals to file gender-based harassment claims with the NYCCHR from one year to three years from the date the harassment occurred.¹⁹ The City Act also expanded protections for all employees, regardless of the size of the employer, and also applies to interns and independent contractors.²⁰

Local Law 95 of 2018 requires all New York City-based employers to post a notice in the workplace and distribute a fact sheet to their employees.²¹ The notice must be displayed in both English and Spanish and conspicuously posted in the workplace in a common area. The notice describes the complaint process with the NYCCHR, provides employees with examples to help identify discrimination, urges witnesses of sexual harassment to report it, and explains that retaliation for reporting sexual harassment is prohibited. The fact sheet, which must be distributed to employees either upon hire or incorporated into the employee handbook, again states that retaliation is prohibited, illustrates examples of sexual harassment, and provides ways in which employees can report sexual harassment.

Furthermore, Local Law 96 of 2018 requires employers with 15 or more employees to implement an "interactive" sexual harassment training for all employees, including supervisory and managerial employees, in their workplace effective April 1, 2019.²² The training must meet the following minimum standards:

1. Statements that sexual harassment are a form of unlawful discrimination under local, state, and federal law;
2. Descriptions of sexual harassment using examples;
3. Information regarding the internal complaint process for addressing sexual harassment claims available to employees through their employer;
4. Information regarding the external complaint process available through the NYCCHR, the NYSDHR, and the EEOC, including contact information;
5. Information regarding the prohibition of retaliation using examples;
6. Explanations of bystander intervention and how to engage in it; and
7. Information regarding the particular responsibilities of supervisory and managerial employees in preventing sexual harassment retaliation, and steps that employees may take to appropriately address sexual harassment complaints.²³

Employers may provide such training in-person or online, so long as it is a, "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use

of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission.”²⁴ The training must be completed within one year of April 1, 2019, and each year thereafter.²⁵ New employees who work over 80 hours in a calendar year on a full-time or part-time basis must receive the training within 90 days of hire.²⁶ The NYCCHR is coordinating with the state to develop online training materials that satisfy both state and city requirements, and the online training should be available on or before April 1, 2019.²⁷ The NYCHRL also mandates that employers keep a record for at least three years of the trainings they have conducted, including signed employee acknowledgements, which may be electronic.²⁸

Conclusion

The sweeping changes to New York’s state and local laws place New York at the forefront of states taking action to root out and eliminate sexual harassment in the workplace. What remains to be seen is what effect these laws have in changing practices within various industries. Now that the spotlight has been trained on the problem, it is the work of employers, employees, and their counsel together to truly eradicate sexual harassment and transform workplace culture so that all employees are able to work free from discrimination.

Endnotes

1. This article was adapted from a paper submitted in connection with panels at the New York City Bar Association and NYU School of Law in October 2018.
2. Nicole Smartt, *Sexual Harassment in the Workplace in a #MeToo World*, FORBES (Dec. 20, 2017), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/12/20/sexual-harassment-in-the-workplace-in-a-metoo-world/#23dce5d5a42>; ACC Docket Staff, “#MeToo: The Global Impact of the Sexual Harassment Movement,” 36 No. 3 ACC Docket 68 (Apr. 2018).
3. Pamela Hutchinson, *#MeToo and Hollywood: What’s Changed in the Industry a Year On?* THE GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/world/2018/oct/08/metoo-one-year-on-hollywood-reaction>.
4. Jeff Green, Riley Griffin, Hannah Recht, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>.
5. Chai R. Feldblum, Victoria A. Lipnic, U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.
6. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>.
7. Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, (Oct. 3, 2018), <https://news.bloomberglaw.com/daily-labor-report/states-take-up-metoo-mantle-in-year-after-weinstein>.
8. See N.Y. Exec. L. §§ 290 *et seq.* (NYSHRL); N.Y.C. Admin. Code §§ 8-101 *et seq.* (NYCHRL).
9. See *Combating Sexual Harassment in the Workplace* (Oct. 1, 2018), <https://www.ny.gov/programs/combating-sexual-harassment-workplace>; N.Y. Labor Law § 201-g.
10. *Combating Sexual Harassment: Frequently Asked Questions* (Oct. 1, 2018), <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions>.

11. *Minimum Standards for Sexual Harassment Prevention Policies*, (Oct. 1, 2018), <https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf>.
12. See *id.*; see also N.Y. Labor Law § 201-g(1).
13. *Minimum Standards for Sexual Harassment Prevention Training*, (Oct. 1, 2018), <https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf>.
14. *Training Requirements*, (Oct. 1, 2018), <https://www.ny.gov/combating-sexual-harassment-workplace/employers>.
15. CPLR 7515; see also *Combating Sexual Harassment: Frequently Asked Questions – Mandatory Arbitration* (Oct. 1, 2018), <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#mandatory-arbitration>. The statute acknowledges this provision may be preempted by federal law, as it states that exceptions include clauses that are inconsistent with federal law or collective bargaining agreements. See CPLR 7515(b)(iii)(a), (c).
16. CPLR 5003-b; N.Y. Gen. Oblig. Law § 5-336; see also *Combating Sexual Harassment: Frequently Asked Questions – Nondisclosure Agreements* (Oct. 1, 2018), <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#nondisclosure-agreements>.
17. *Id.*
18. See N.Y.C. Admin. Code §§ 8-107(29)-(30).
19. *Mayor de Blasio Signs Legislation Strengthening Protections Against Sexual Harassment*, (May 9, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/243-18/mayor-de-blasio-signs-legislation-strengthening-protections-against-sexual-harassment#/0>. The new statute of limitation for sexual harassment claims exceeds the state statute of limitations period of one year and the federal EEOC statute of limitations period of between 180-300 days.
20. See N.Y.C. Admin. Code §§ 8-102; 8-107(30)(e). The NYCHRL applies to independent contractors whose work furthers the employer’s business and who are not themselves employers. (“For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.”).
21. See N.Y.C. Admin. Code § 107(29); Mayor de Blasio, *Stop Sexual Harassment Act Factsheet* (2018), available at: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf.
22. See N.Y.C. Admin. Code § 8-107(30)(b).
23. See N.Y.C. Admin. Code §§ 8-107(30)(b)(1)-(8).
24. See N.Y.C. Admin. Code § 8-107(30)(a).
25. See N.Y.C. Admin. Code § 8-107(30); <https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page>.
26. See N.Y.C. Admin. Code § 8-107(30)(b).
27. See “Combating Sexual Harassment: Frequently Asked Questions – Q4”, (Oct. 1, 2018), <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers>.
28. See N.Y.C. Admin. Code §§ 8-107(c)(1)-(2).

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