



Episode 58: “Update Alert: Key Takeaways From the New NYS Model Sexual Harassment Prevention Policy”

Speaker: Ari Kwiatkowski

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, everyone. Welcome to episode 58, “Update Alert Key Takeaways From the New York State Model Sexual Harassment Prevention Policy.” And that is a mouthful. But I am here to break down changes to New York State’s model sexual harassment prevention policy, I will call it the sexual harassment policy for purposes of the podcast, but I want everyone to know it as sexual harassment prevention policy. You know, back on April 23, New York State finalized its changes to the policy for 2023. There’s quite a bit to go through. But, you know, as usual, I am endeavoring to get you the updates and the information as quickly, seamlessly as possible, and to streamline what you need to know.

[Ari]: So before I dive in, I haven’t done a solo episode in a while, so I wanted to, of course, play by my own rules and abide by my own rules and provide an interesting or fun fact about myself. I’m happy to share with all of our listeners that my interesting and fun fact is I am currently five months pregnant and I am due to have a little girl in the fall. So we’re excited. Definitely the most interesting thing that’s happened to me over the last few years. So that is my fun or interesting fact for the day. So now that we’ve gotten that out of the way, let’s dig in.

[Ari]: Let me tell you what you need to know about the new sexual harassment policy published by the state. As I mentioned a few minutes ago the changes were finalized on April 23. And the Model Sexual Harassment Prevention policy is available on the New York dot gov, New York State’s website. You know, we’ve got a couple of questions from clients over the last few weeks whether or not adopting the state’s model policy is required. You know, the long and short, excuse me, the short answer to that is no, it’s not required. However, given that the state does provide, you know, the model policy, they provide it, you can download it in a Word format, if you’re an employer listening, you know, I am recommending to clients that they just go ahead and use the model policy, because I think in the unlikely event of a complaint being filed, a complaint of discrimination or charging an employer with sexual harassment, with the Division of Human Rights, I think that the division will be looking closely to make sure that all of the new requirements that we will be talking about today are included. So I just wanted to mention that right off the bat, it’s a question we get. I don’t think there’s necessarily a right or wrong answer, but, I think since the state has been kind enough to provide us with, you know, the model policy in Word format, it may be it may be worth it to just adopt it. But in any event, let’s jump into the changes. As I mentioned a couple minutes ago, I am endeavoring to give get you guys the information in an easily digestible way, or at least as easily as I can.

[Ari]: So number one is a pretty quick one. I wanted to point out for everyone: the new sexual harassment prevention policy has information regarding the Division of Human Rights sexual harassment hotline. So the division does have a sexual harassment hotline where employees who are complaining of sexual harassment or are victims of sexual harassment can call into. That is included in the new model policy. And that is a change. It was not included before.

[Ari]: Let's talk about the next thing: the new policy really emphasizes that intent is irrelevant. And I think we've, you know, those of us who have practiced in New York for the last few years or employers who have handled these types of claims or been the subject of these types of complaints, know that that really has been the case. Intent is irrelevant according to the new policy, the impact on the victim is what is important. And as we know, New York State applies a reasonably objective standard. So whether or not sexual harassment has occurred is viewed from the standpoint of a reasonable victim. So a similar person situated or in the same shoes as the person alleging sexual harassment. So wanted to point that out because that's definitely a point of emphasis in the new policy as well.

[Ari]: One thing I wanted to bring to everyone's attention is supervisor responsibility. If you're an employer in New York State, hopefully you know that supervisors who witness sexual harassment are required to report it. It's always a requirement for your supervisors, for your managers, things of that nature. One of the things that the new policy discusses, though, which is definitely a change, is that supervisors who are investigating allegations of sexual harassment have to accommodate the needs of individuals who have experienced harassment to ensure the workplace is safe, supportive, and free from retaliation. So I think this is a shift which is emphasized in the new policy that, if you are investigating allegations of sexual harassment, it is really incumbent upon your management team, your supervisors, your managers to really have an empathetic point of view toward the person alleging sexual harassment or the victim. And to keep that in mind throughout the course of the investigation and to really consider the feelings, the viewpoint of the person alleging sexual harassment. So that is certainly something new for 2023. And definitely worth mentioning.

[Ari]: Another new point for 2023, which is interesting is that the new policy really stresses bystander intervention. So, you know, as I mentioned a few minutes ago, it's very important that your workforce, employers, workforce employees know that, you know, it's a "see something say something" environment. And if supervisors witness anything in particular they must report it; all of their employees are encouraged to report it, and have been under the prior forms of the sexual harassment policy published by the state. But there is a renewed emphasis or a new emphasis, I should say, on bystander intervention. So of course the policy outlines that bystanders or witnesses to conduct that may amount to sexual harassment and are encouraged to report the sexual harassment.

[Ari]: But what's new for 2023 is that New York State has actually provided some examples of methods that a bystander can use to interrupt the harassment or things that bystanders can do with respect to reporting the harassment. And I want to run through these five "methods," as the state calls them, because I think they're pretty interesting. So first, the state says a bystander can interrupt the harassment by engaging with the individual being harassed. And distracting them from the harassing behavior. A bystander who feels unsafe interrupting on their own can ask a third party to help intervene in the harassment. So that's the second method provided by the state. Third, a bystander can record or take notes on the harassment incident to benefit a future investigation. Number four, a bystander might check in with the person who has been harassed after the incident. See how they're feeling and let them know that the behavior was not acceptable. And number five, if a bystander feels safe they can confront the harassers and name the behavior as inappropriate. And of course, the state notes, when confronting harassment or harassers, physically assaulting an individual is never an appropriate response. So those are the five bystander methods the state has identified. It's not meant to be an exhaustive list from my reading of the new policy, but it's certainly interesting and food for thought, because it seems, you know, to some extent the state is suggesting that you can, or bystanders are encouraged to, record interactions between other individuals. And, you know, I think certainly, it's interesting because that could bring up some additional potential issues. And, you know, I think it's definitely food for thought. I'm not sure how that will play out in the workplace. But I did want to bring this to everyone's attention because these are methods that are explicitly identified and included in the new policy for 2023.

[Ari]: So let's move on from bystander intervention. The new policy also discusses remote work, and I think this of course makes sense given everything that's happened with the pandemic and is certainly reflective of a shift toward remote work or at least hybrid work in many industries being fairly common. And what the state has said is that sexual harassment is not limited to the workplace itself. Sexual harassment and conduct arising to the level of sexual harassment can really permeate outside of work, specifically through calls, texts, emails, social media. That can constitute unlawful workplace harassment even if the employee or the harasser engages in that conduct through those mediums and is not on the premises. So basically, for example, one of the things included in the new model policy is that it encompasses things that may be in the background of Zoom calls that are inappropriate. Things like that. So of course, something to pay attention to because a lot of us in many industries are really functioning remotely. You know, meeting on Zoom, meeting on Teams. These are very common methods to meet with employees. So it's certainly something that employers should be aware of it and certainly counsel their employees appropriately. But this really is important because you know, I just want to underscore that it does not mean that these calls, emails, text, Teams messages have to occur at work or during work hours. This really extends what may constitute sexual harassment past work hours. And it's very important to pay attention to it.

[Ari]: So. One thing I also wanted to mention, which has been emphasized in the new policy for 2023 is retaliation. So hopefully if you're listening, if you're an employer, if you are a manager, or a supervisor, you know what retaliation is. Basically, the model sexual harassment prevention policy has always provided that an employer could not retaliate against an employee for reporting sexual harassment in the workplace. One of the new requirements, or one of the new things emphasized in the 2023 policy is a good faith defense for employees. So basically the policy says that even if the harassment reported doesn't rise to the threshold or level of sexual harassment, the individual who reported it is protected from retaliation. Any form of retaliation by the employer if they had a good faith belief that the practices or the conduct were unlawful. So basically, I think of this as like a good faith defense. If you have an employee who reports sexual harassment and it did not rise to the level of sexual harassment. Maybe it was a misunderstanding, you as an employer can not retaliate against that employee for taking or making, taking action or making that complaint because they believe that they had a legitimate reason to complain.

[Ari]: There are there's also some additional new information as it relates to retaliation for the new policy this year. You know there's definitely specific examples provided by the state. The state has given us in the new policy six examples. I'll run through them quickly of what may constitute retaliation. That is: demotion, termination, denying accommodations, reduced hours. Things we would typically think of...publicly releasing personnel files. Obviously, I believe it was last year, New York State came out with a new law that said that you cannot release personnel files as a form of retaliation as an employer. I think this is right in line with that. Refusing to provide a reference for an employee, labeling an employee as difficult, or excluding them from projects to avoid drama. Undermining an individual's immigration status or reducing work responsibilities, passing over for a promotion or moving an individual's desk to a less desirable office location. So I think this is meant to give broad yet specific examples of what may qualify as retaliation for an employee who potentially reports sexual harassment in the workplace.

[Ari]: Just a couple more guys. I think we're running through them pretty quickly. But I think this is all very important. The 2023 policy also emphasizes that gender-based harassment is not limited to sexual contact or sexual conduct, but it can include gender stereotyping. So there's a renewed emphasis in the new policy on gender diversity. Competency on behalf of employers as it relates to gender diversity, and really expanding what may qualify as harassment in that it's not strictly sexual harassment or conduct of a sexual nature. It can be gender-based harassment, including relating to how an individual identifies with respect to their gender.

[Ari]: So again, I think this reflects a growing trend across the state and nationally requiring really that competency on behalf of an employer and is certainly worth mentioning. And lastly, the last thing that I wanted to talk with everyone about is that the policy makes clear that the requirements therein apply to all

other forms of discrimination under state law. So under the New York State Human Rights Law or executive law, of course, there are several protected classes or characteristics that are protected in the law. Race, gender, disability, etc. The state has basically said that what it is saying as it relates to sexual harassment applies to all those other forms of discrimination.

[Ari]: Well, everyone, I think that's everything I wanted to run through with you as it relates to the new model sexual harassment prevention policy. If you have any questions, comments, comment on YouTube, send me a LinkedIn message, send me an email. I definitely want to hear from you. Until next week, talk to you guys soon.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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