

ANTI-DISCRIMINATION, ANTI-HARASSMENT, ANTI-RETALIATION POLICIES: BEST PRACTICES

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Especially after New York Governor Cuomo's expansion of the protection of women in the workplace through his Women's Equality Agenda and his directive to the New York State Division of Human Rights to draft regulations to extend employment protections to transgender individuals, it is an important time to be reviewing your anti-discrimination, anti-harassment, anti-retaliation policies and the implementation of those policies. Consider the following:

Update Your Policy: Be sure your company's anti-discrimination, anti-harassment, anti-retaliation policy has a clear expectation that employees will report any discrimination or harassment and that the policy has more than one avenue for complaint. Also remember that there are rules pursuant to the changes at the National Labor Relations Board (NLRB) that prohibit a blanket confidentiality requirement for complainants and/or witnesses. Accordingly, review the language about confidentiality.

NOTE: If your company has fewer than four employees, you may not have an anti-discrimination, anti-harassment, anti-retaliation policy. Now, pursuant to the revisions to the New York State Human Rights Law, an employer may be liable for claims of sexual harassment regardless of the number of employees. If you are a small employer who has avoided jurisdiction of the New York State Division of Human Rights because of your size, you need to reconsider implementing a policy to protect against claims of sexual harassment.

Confirm Your Company Requires Acknowledgement: Be sure, either if your anti-discrimination, anti-harassment, anti-retaliation policy is included in your employee handbook or if it is a free-standing policy, that all employees have signed and acknowledged the policy. If you determine that you need to update the policy, ensure that all current and new-hire employees execute an acknowledgement of their rights and responsibilities under the policy. If an employee raises a claim of discrimination to an outside governmental agency, but has not filed an internal complaint pursuant to your company's anti-discrimination, anti-harassment, anti-retaliation policy, the acknowledgment of the obligation to report will be one aspect of the defense.

Training for Employees: If you are not already doing so, consider mandatory training for employee on the terms and expectations pursuant to your company's anti-discrimination, anti-harassment, anti-retaliation policy. It is important for

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employees to know their rights and obligations pursuant to the policy. You may face claims characterized as “discrimination” and “harassment” that do not meet the legal definition—for example, “the foreman yells at me when I do not do my job.” Training can help to educate employees about the legal definition of prohibited conduct. Training can be facilitated by your in-house human resources staff or by an outside facilitator, including your legal counsel. Be sure to keep an attendance sheet confirming who has attended the training programs. Consider training on an ongoing basis, perhaps annually or biannually, and be sure that training on this policy is part of your new-hire training.

Training for Supervisory Employees: Your supervisory employees certainly have a responsibility under the anti-discrimination, anti-harassment, anti-retaliation policy to comport their own conduct with the policy. These individuals likely have a heightened responsibility. Specifically, even if not specifically designated as a reporting source, an employee may approach his or her supervisor to lodge a complaint. Although the supervisor may initially attempt to resolve the issue informally between two employees if the matter is a personality conflict, not a true complaint of unlawful harassment, discrimination, or retaliation, supervisors should nonetheless be reminded of their obligation to report an complaints made to them. Even if a complaining employee implores a supervisor not to share the information with human resources, the supervisor must bring the complaint forward to avoid future liability for the company.

Implementation: No matter how good a policy is, it will not be worth the paper it is printed on without good implementation. Be sure that your company has good systems in place to receive, investigate, and document any claims of a violation of your anti-discrimination, anti-harassment, anti-retaliation policy. Often time, a thorough and timely investigation into an internal complaint will be a significant factor in prevailing on a claim of discrimination or harassment.

An effective anti-discrimination, anti-harassment, anti-retaliation policy is a solid proactive step that your company can take to protect against and defend (if necessary) claims of harassment, discrimination, and retaliation.