



# Eye on Washington Legislative Update



## Legislative Trends: Sexual Harassment Prevention in the Workplace

*This Eye on Washington's series focuses on the latest HR regulatory trends taking place at the federal, state and local levels. Topics include tax and HR compliance, Health Care Reform, payroll, benefits, leaves, reporting obligations and more.*

### Background

Sexual harassment in the workplace has garnered much attention across the country, as the issue spans all genders, ethnicities, races, ages, and industries. The Equal Employment Opportunity Commission (EEOC) promotes respectful workplaces and combats all forms of workplace harassment under Title VII of the Civil Rights Act of 1964 (Title VII) based on sex, race, national origin and religion. The EEOC defines sexual harassment as “unwelcome sexual conduct when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment.” Going one step further, the U.S. Supreme Court determined that sexual harassment is actionable under Title VII as a form of discrimination based on sex. Accordingly, for sexual harassment to violate Title VII, the actions must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”

In reaction to the #MeToo movement — founded in 2006 to help survivors of sexual violence by addressing the dearth in resources for survivors and by building a community of advocates — legislators are proposing bills to help prevent sexual harassment in the workplace. Although this is not a new topic, due to the national spotlight it has become more common to hear stories about victims of sexual harassment in the workplace. In fiscal year 2018 (October 1, 2017 to September 30, 2018), the EEOC received 7,609 sexual harassment charges — a 13.6% increase from fiscal year 2017. In total, the EEOC obtained \$56.6 million dollars in monetary benefits for victims of sexual harassment during fiscal year 2018.

### What Is the Trend?

The legislative trend sweeping the country proposes new laws designed to help ensure employers are providing adequate training on sexual harassment prevention. The intent is to lower the instances of sexual harassment in the workplace by training employees on what constitutes sexual harassment; how they may report incidents; how investigations are carried out; and redress for victims. Thus, state and local jurisdictions, through statutory sexual harassment prevention training requirements, are putting more responsibility on employers to prevent harassment from occurring.



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The laws vary depending upon the jurisdiction — from the level of employee required to receive the training; to the content and format of training; to frequency of harassment. For instance, in early 2018, a new law effective in California required sexual harassment training for supervisory employees for employers with 50 or more employees. That same calendar year, during the subsequent legislative session, California enacted a new law for employers with five or more employees, requiring training for all supervisory and non-supervisory employees. While other jurisdictions may mandate training for manager-level-only employees, some, like California, require it for all employees.

The frequency and content of training are other provisions that vary by jurisdiction. In California, the training must occur within six months of an employee's assumption of a position, and every two years after that. In New York City, employers must provide their employees with anti-sexual harassment training at least once per calendar year, in addition to training employees as soon as possible after hire. Additionally, employers may have to include certain information in their training, such as state and federal statutory provisions concerning sexual harassment and remedies available to victims; the employer's policy regarding sexual harassment; examples of the type of conduct that constitutes sexual harassment; and even bystander training. Training in New York State, for instance, must provide examples of prohibited conduct constituting unlawful sexual harassment and include local, state and federal statutory provisions relating to sexual harassment, as well as explaining the procedure for the investigation of complaints and informing employees of their rights. Further, some laws vary with respect to the format of training. One state may require that employers only use the state-created training module. Others may require that the training be interactive. California law allows employers to select which training format works best for them; the training

may occur in a classroom setting, through interactive E-learning, or through a live webinar. Other laws may set the minimum or maximum length of the training, or specifying that training should be offered in languages other than English.

Another facet of this legislative trend calls out specific industries that are more likely to have victims of sexual harassment — such as retail or hospitality businesses — to provide protections against such incidents. Washington State recently enacted a law designed to prevent harassment in the workplace for "isolated workers"; that is, those who work in the hotel, motel, or retail industries, or who may work as security guards or property services contractors. Employers who fall within these industries are required to provide training and have certain procedures in place to handle complaints and carry out investigations. Both Illinois and New Jersey have proposed bills during their 2019 legislative sessions aimed at restaurant industries, requiring certain employers to have specific training and other policies in place to handle sexual harassment by employees.

### Impact to Employers

Employers face challenges on multiple fronts with respect to handling sexual harassment in the workplace. They are expected to have policies and procedures in place to help ensure incidents are reported and, when they are, to guarantee they are handled properly. Another challenge for employers is the vast number of laws across the country relating to the prevention of sexual harassment in the workplace. Having a patchwork quilt of training requirements across jurisdictions makes it difficult for employers to ensure all training obligations are met. In addition, if an employer has a one-size-fits-all policy for sexual harassment prevention, it may not work if that employer is obligated to follow different laws across

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multiple jurisdictions. Further, these laws typically outline consequences for employers with respect to their sexual harassment prevention programs and lack of compliance with such laws. Most laws have monetary or other penalties for employers who do not implement required training.

### Consideration for Next Steps

Employers should consider reviewing with their legal counsel how they may be affected by this legislative trend. In doing so, they may want to ensure that their policies and procedures are clear, consistent and up-to-date with evolving requirements. Having transparent policies helps employees understand the implications and impact of sexual harassment in the workplace. As part of a policy and procedure review, employers may also want to check out how they handle workplace bullying and retaliation. Too often, retaliation and bullying behavior go together with sexual harassment.

Further, employers may want to consider addressing their company culture of inclusion and respect. This may be a top-down, cultural effort to help foster more inclusion and respect in the workplace, as training alone is not enough to end harassment. Training may, however, help serve as a foundation for a proactive shift toward improving company culture.

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