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SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: DELAWARE COMPANIES NEED TO KNOW

Delaware has responded to the #MeToo movement through legislation. Sexual harassment has long been a legally cognizable form of sex discrimination under the Delaware Discrimination in Employment Act. However, as of January 1, 2019, sexual harassment is separate from discrimination – including sex discrimination. Both men and women are protected by Delaware's sexual harassment law.

NEW NOTICE IS REQUIRED

Under this new law, for every employee hired after January 1, 2019, employers must distribute, physically or electronically, a copy of a sexual harassment information sheet created by the Delaware Department of Labor ("DDOL"). The State-specific posters that often are published and sold by vendors likely do not have the DDOL's information sheet included. Even if they do, it is likely insufficient merely to post the information sheet as often is sufficient for other employment laws.

For any employee of an employer who was employed on or before January 1, 2019, the employer has until July 1, 2019, to distribute the information sheet.

NEW TRAINING IS REQUIRED

For those who have fifty or more employees, new training requirements must be met. In counting the employees for purposes of the training requirement, employers do not count applicants or independent contractors. Nor must employers provide the required training to applicants, independent contractors, or employees employed less than six months continuously. Moreover, employment agencies are the only employers required to count and provide training to employees placed by employment agency.

Employers must take care in determining who is an "independent contractor." The often flexible and fact intensive standards for determining employment status for other purposes do not apply to Delaware's new sexual harassment law, which defines "independent contractor" as an individual who fulfills each of three requirements:

- performs the work free from the employer's control and direction over the performance of the employee's services;
- is customarily engaged in an independently established trade, occupation, profession or business; and
- performs work which is outside of the usual course of business of the employer for whom the work is performed. Thus, it is likely that some who are properly classified as independent contractors for other purposes must be counted as "employees" for purposes of calculating the fifty-employee threshold.

When training is required, an employer must provide training that is interactive. The term "interactive" is not defined. Such employers must also provide its employees with education regarding the prevention of sexual harassment. For employees hired after January 1, 2019, the training must be provided within 1 year of the commencement of employment and thereafter every 2 years. For employees employed on or before January 1, 2019, the training must be provided by January 1, 2020, and thereafter every 2 years. The training must include:

- the illegality of sexual harassment;
- the definition of sexual harassment using examples;
- the legal remedies and complaint process available to the employee;
- directions on how to contact the DDOL; and
- the legal prohibition against retaliation.

When training is required, an employer must provide additional training for supervisors, which means an individual that is empowered by the employer to take an action to change the employment status of an employee or who directs an employee's daily work activities. For those who are "new supervisors" after January 1, 2019, the training must be provided within 1 year of the commencement of employment as a supervisor, and thereafter every 2 years. For those who are supervisors on or before January 1, 2019, the training must be provided by January 1, 2020, and thereafter every 2 years. The supervisor training should include the same things required of non-supervisors plus "the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment." The new law does not detail what is meant by "the specific responsibilities."

For employers who provided training to employees or supervisors prior to January 1, 2019, that would satisfy the requirements under the new law, no additional training is required until January 1, 2020 – though presumably that applies only to those employees or supervisors who received the training.

DEFINITION OF SEXUAL HARASSMENT AND EXAMPLES

As stated above, training must include "the definition of sexual harassment using examples." Delaware's new law describes sexual harassment as when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment;
- submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

Delaware's new sexual harassment law does not list any examples of sexual harassment outside what is stated as part of the meaning of sexual harassment. While not expressly required as part of the training, the DDOL information sheet lists the following as "some examples of sexual harassment":

- unwelcome or inappropriate touching;
- threatening or engaging in adverse action after someone refuses a sexual advance;
- making lewd or sexual comments about an individual's appearance, body, or style of dress;
- conditioning promotions or other opportunities on sexual favors;
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.;
- making sexist remarks or derogatory comments based on gender.

WHEN THE EMPLOYER IS RESPONSIBLE

Delaware's new law states that when sexual harassment exists, an employer is responsible when:

- a supervisor's sexual harassment results in a negative employment action of an employee;
- a negative employment action is taken against an employee in retaliation for the employee filing a discrimination charge, participating in an investigation of sexual harassment, or testifying in any proceeding or lawsuit about the sexual harassment of an employee; or
- the employer knew or should have known of the non-supervisory employee's sexual harassment of an employee and failed to take appropriate corrective measures.

For this final area of potential responsibility, it is an affirmative defense if the employer proves that: (a) the employer exercised reasonable care to prevent and correct any harassment promptly; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Compliance with the information sheet distribution requirement described above does not insulate the employer from liability for sexual harassment of any current or former employee or applicant. Nor is failure to distribute the information sheet in and of itself something that can result in liability of any employer to any present or former employee in any action alleging sexual harassment. However, it is expected to prove difficult for an employer to prevail on the affirmative defense if the employer does not distribute the information sheet as required.

WHO MUST COMPLY?

As has been the case since before this new law became effective, sexual harassment claims can exist under Delaware law even when as few as four employees are employed. The threshold under federal law is fifteen employees. Nonetheless, the number of "employees" must still be calculated when determining whether the law applies.

Delaware's new sexual harassment law provides new definitions of both "employer" and "employee," which apply only to the new sexual harassment provisions of Delaware law. Specifically, for purposes of sexual harassment but not for purposes of sex discrimination (or other forms of discrimination, including harassment), employees include:

- any individual employed in agriculture or in the domestic service of any person;

- any individual who, as a part of that individual's employment, resides in the personal residence of the employer; (3) any individual employed by said individual's parents, spouse or child; and
- any individual elected to public office in the State or political subdivision by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Because the term "employee" is broader for sexual harassment than for sex discrimination, the somewhat odd situation exists where an employer might prevail on a sex discrimination claim but not prevail on a claim for sexual harassment based only on the different meanings of the word "employee."

On the other hand, within the government/public employment context, the term "employer" arguably is narrower for sexual harassment than for sex discrimination. Specifically, the definition of "employer" in the new sexual harassment law incorporates the definition of "state agency" from another law, which is narrower than the broad categories included in the definition of "employer" for purposes of sex discrimination (and other forms of harassment). That means that some in government/public employment who had protection relating to sexual harassment before January 1, 2019, may not have protection now. Furthermore, some of the new provisions concerning sexual harassment – including those discussed below – may not apply to those who are government/public "employers" under the sex discrimination law. However, that nuance is unlikely to impact any employer outside the government/public employer context; and many believe that such application of the plain language of the law is an unintended consequence even for such employers.

ENFORCEMENT MECHANISM

The same enforcement provisions, powers of the DDOL, and administrative process applies to sexual harassment claims as that which applies to sex discrimination claims, as does the same right of private action, judicial remedies, and civil penalties. In general, like under federal law, exhaustion of administrative remedies is required culminating in receipt of a right to sue notice.

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