

2019

WORKPLACE HARASSMENT PREVENTION TRAINING: A SMART BUSINESS IDEA IN ANY STATE

Executive Summary

In a corporate environment, sexual harassment training is usually a periodic obligation. In many workplaces, this 'training' may just be watching a video once a year, while many firms don't conduct any at all. Whether a corporation implements training, and what that course entails, will depend on the State's anti-discrimination laws.

Of all the discrimination complaints the Equal Employment Opportunity Commission receives every year, almost a third relate to sexual harassment in the workplace.

The world changed in late 2017 when the hashtag #MeToo went viral on social media; empowering survivors of sexual harassment and abuse all over the world. Survivors across the globe shared their stories and experiences in an attempt to demonstrate the widespread prevalence of sexual assault and harassment, particularly in the workplace.

By 2018, an unprecedented amount of legislation and policies on sexual harassment were introduced, with over 125 pieces of legislation in 32 States. From introducing legislation to expelling members, criminalize sexual harassment in legislatures, to mandating workplace sexual harassment prevention training.

As of 2019, workplace harassment training is no longer a 'check-the-box' exercise.

Everyone loses when sexual harassment or discrimination occurs in the workplace. It affects productivity and lowers morale at all levels of an organization. Most importantly, it can even result in a lawsuit. To prevent harassment, companies need to maintain a mutually respectful workplace culture.

This whitepaper explores why Workplace Harassment Prevention Training is an organization's main weapon for protecting their workforce and their business.

2019

Why Now?

Anti-harassment training has been part of the employment landscape for decades.

The problem is that training is not the end solution to protecting your workforce and business. Culture, created by leadership and proactively driven by HR departments, plays a big part. If a culture of respect doesn't exist in your organization then harassment prevention training will fail. The training in place is a key indicator of what sort of workplace the organization aspires to be.

After analyzing 74 examples of sexual harassment training from 1980 to 2016, Elizabeth Tippet, associate professor at the University of Oregon School of Law, concluded that most training programs are too narrow in their themes. In her analysis, Tippet compared the incremental content changes in the training to "software updates." Training that focuses on legal language and obscure, unlikely misconduct scenarios.

If the company in question only needs a better understanding of the law, then this approach might work, Tippet said. More often though, the problem lies in employee attitudes and behaviors, which stale video presentations won't address or easily change.

5 Reasons Harassment Training Is Not Working

A tick-the-box mentality

If workers feel like they're being subjected to training just to satisfy lawyers or insurers, they won't take it seriously.

Excludes positive behavior

Most training only focuses on prohibited areas, rather than what interactions between employees are healthy and permitted.

Ignores inappropriate behavior

Training that only covers what is legal and illegal addresses one side of matter. The workforce should understand what behavior is considered inappropriate and wrong.

2019

Outdated scenarios

It's unrealistic to think your training in place is doing something if it doesn't reflect the workforce in place. Videos or skits that demonstrate only the most obvious situations, or have no relevance to that particular workplace will be ignored.

Disconnects workers

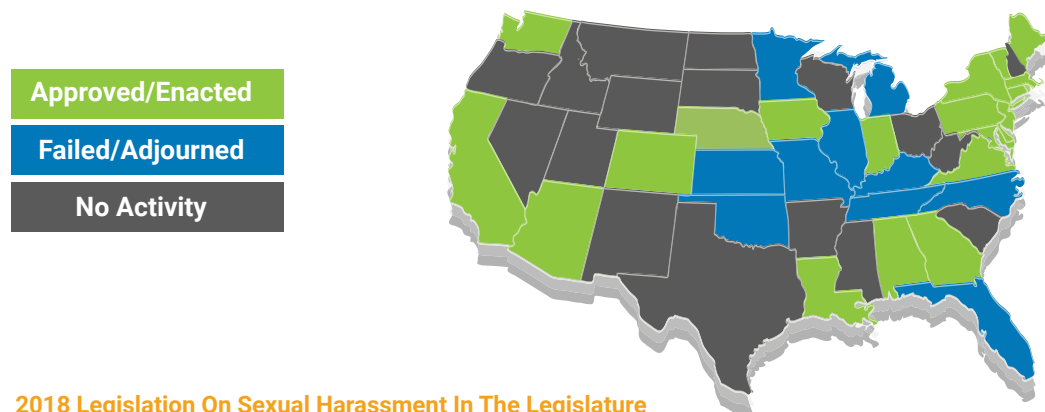
Training that makes a specific audience feel defensive will lead to workers feeling accused, and employee behavior won't change with threats of consequences.

What #MeToo Really Means For Business

Few states and local governments followed suit since California's first training law was passed more than a decade ago, but the #MeToo movement has inspired progressive legislatures in 2018 to revisit mandatory sexual harassment training programs statewide for nearly all workers and supervisors.

The most comprehensive sexual harassment policies were passed in California and New York, two states that are often leaders on new initiatives in the employment law space. A handful of states, including Maryland and Louisiana, added sexual harassment training requirements for government employees.

This unprecedented amount of legislation and policies on sexual harassment introduced over 125 pieces of legislation in 32 states. Multi-state employers must now keep track of their obligations across the country as laws continue to grow.



2019

Quick Guide To Workplace Harassment Training Across The U.S.

CALIFORNIA

Who:

Effective, January 1, 2019, the law applies to California employers with 5 or more employees (used to be 50).

When:

By January 1, 2020, employers must provide required training to all supervisory and non-supervisory employees within six months of employment or assuming a supervisory position.

Beginning January 1, 2020, employers must provide training for seasonal and temporary employees or any employee hired to work for less than six months, within 30 calendar days of hire or within 100 hours worked, whichever occurs first (except for those employed by a temporary services employer that must provide the training), and migrant and seasonal agricultural workers.

What:

SB 1343 requires covered employers to provide at least 2 hours of sexual harassment prevention training and education to all supervisory employees and at least 1 hour of such training to all non-supervisory employees in California, by January 1, 2020. Training and education must be provided once every two years thereafter, as specified under the new law.

What's New:

Since California AB 1825 became effective in 2005, California has required sexual harassment training for supervisors every two years. Prior to 2019, California law only required training for supervisors.

The new law doesn't just increase the employee groups trained. It also expands the number of companies required to train. Previously, only companies with 50 or more employees were required to conduct harassment training. Now, that number's been lowered to five employees.

2019

CONNECTICUT

Who:

Connecticut's law covers employers with 50 or more employees for a minimum of 13 weeks the previous training year.

When:

Supervisors of employees in Connecticut within 6 months of assuming a supervisory position.

What:

Since 1993, Connecticut employers with 50 or more employees must provide 2 hours of interactive sexual harassment prevention training and education to all supervisory employees.

DELAWARE

Who:

Effective Jan 1, 2019, employers with at least 50 employees in Delaware must provide "interactive training and education to employees regarding the prevention of sexual harassment." It also obligates employers (with 4 or more employees) to issue an information sheet on sexual harassment.

When:

All employees:

- Within one year of beginning employment for new employees.
- Within one year of the law's effective date for existing employees.

Employers are not required to provide training to:

- Applicants.
- Independent contractors.
- Employees employed less than six months continuously.
- Employees employed by employment agencies (the employment agency is responsible for training their employees).

What:

Interactive training must be conducted for new employees within one year of the

2019

commencement of their employment. Existing employees must receive sexual harassment training within one year of the effective date of the statute (that is, by January 1, 2020).

New supervisors must receive additional interactive training within one year of the commencement of their employment in a supervisory role. Existing supervisors must receive training by January 1, 2020.

MAINE

Who:

Applies to all workplaces with 15 or more employees.

When:

All new employees within one year of beginning employment. There are additional requirements for supervisory and managerial employees within one year of beginning employment.

What:

Employers shall conduct additional training for supervisory and managerial employees within one year of commencement of employment that includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.

NEW YORK STATE

Who:

New York's training laws apply to all employers regardless of size.

When:

The training requirements apply to all employees working any portion of their time in New York, even if they're based in another state.

What:

Effective immediately, New York employers must: (i) implement the State's model sexual

2019

harassment prevention policy, or create their own sexual harassment prevention policy that meets or exceeds certain minimum standards; (ii) make a complaint form available for employees to report sexual harassment; and (iii) conduct interactive sexual harassment prevention training annually, either using the state's model training materials or another program that meets the training requirements.

Training must be completed for all employees every year.

NEW YORK CITY

Who:

Employers with 15 or more employees in the previous calendar year. Independent contractors count toward this threshold.

When:

All employees, including interns, within New York City working more than 80 hours in a calendar year and have worked for at least 90 days.

Employers must also train independent contractors that:

- Have performed work in the furtherance of the business for more than 90 days and more than 80 hours in a calendar year.
- Have not already received the mandated annual training elsewhere.

Unlike the New York State anti-sexual harassment training requirements, the NYC law requires that employers keep a record of all trainings, including a signed employee acknowledgment for at least three years.

What:

Interactive training is required annually.

"Interactive Training" – What Is It Exactly?

Training for 2019 laws and 2019 workplaces is defined as interactive with the purpose of keeping the learners engaged. To Elizabeth Tippet point, sexual harassment training from 1980 to 2016 has not evolved with the times and these new training requirements aim to change that by mandating that the training be "interactive."

2019

California's Definition:

The California Fair Employment and Housing Council has passed detailed regulations defining and clarifying what "interactivity" and other terms mean for employers in the state. California regulations provide that "interactivity" requires that workers be able to ask questions of the training provider and receive answers within two business days.

New York's Definition:

As of April 1, 2019, NYC employers with at least 15 employees are now required to conduct annual, interactive sexual harassment training, while New York state laws requires all employers to provide interactive training regardless of size. Training must be conducted in a manner in which the employee is engaged in trainer-trainee interaction, through the use of audio-visuals, or via some other interactive computer or online training program.

The NYC announcement also brought clarity into what "interactive" training must cover:

- An explanation of sexual harassment as a form of unlawful discrimination under local law;
- A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- A description and examples of what sexual harassment is;
- Any internal complaint process available to employees by employer to address claims of sexual harassment;
- The complaint process available through the NYC Commission on Human Rights, the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission, including contact information;
- The prohibition of retaliation, in addition to sexual harassment, and relevant examples of such;
- Materials regarding bystander intervention; and
- Specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and methods to properly address such situations.

HR Pro in New York? 5 Keys to Compliance

Employers should be diligent in ensuring they are in compliance with all requirements of

2019

both the New York State and City anti-sexual harassment laws. Take the following steps to ensure your organization meets regulatory compliance with New York anti-sexual harassment laws.

Applicability. Consider how many employees were employed by employer at any point within the prior calendar year – If 15 or more individuals were employed, the employer is subject to the requirements of the NYC law in addition to the NYS law.

Interactive Training. Certify that the training utilizes participatory training. While the training does not need to be performed by an in-person instructor, it must be conducted in a manner in which the employee is engaged in trainer-trainee interaction, through the use of audio-visuals, or via some other interactive computer or online training program.

Record-Keeping. Once an employer administers anti-sexual harassment training under the NYC law, they must be certain to maintain accurate records of such training, as well as signed employee acknowledgments, for at least three years following. The NYCCHR has the right to request such records at any point therein. An LMS is an excellent and easy way to keep these records.

Required Notice. Ensure that the anti-sexual harassment notice is posted in a conspicuous location, accessible to all employees. The notice must be posted in English and Spanish, but the NYCCHR offers the notice in nine additional languages if the employer finds such other postings useful to employees.

Required Fact Sheet. Distribute the sexual harassment fact sheet to all new employees no later than the end of the employees' first week of employment. The fact sheet may be distributed in the employee handbook or with other on-boarding materials, by any print or electronic means.

There Are No Laws In My State, Why Should I Care?

In addition to states that require employers to provide sexual harassment training, many other states, such as Colorado, Florida, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Utah, and Vermont, have laws that "encourage" employers to provide such training.

2019

While California, Connecticut, Delaware, Maine, New York State, and New York City have passed statutes requiring sexual harassment training, other federal and state laws, regulations, and court decisions have made clear that employers should provide anti-harassment training to all employees in all states.

For example, an amendment to New Jersey's Law Against Discrimination ("LAD") signed into law on March 18, 2019, invalidates any provision of an employment agreement which "waives any substantive or procedural right or remedy" under the State's broad anti-discrimination laws. The amendment also invalidates confidentiality and non-disclosure provisions in any employment contract or settlement agreement.

In an apparent nod to Stormy Daniels and the #MeToo movement, the amendment prevents employers from enforcing confidentiality clauses designed to keep private the details of claims of discrimination, harassment, or retaliation, and requires every settlement agreement involving a LAD allegation to include a "bold, prominently placed notice" explaining the employee cannot be punished for publicly revealing details of the claim. Though a similar law about sexual harassment claims was passed in New York last year, New Jersey's amendment goes much further by applying to all claims of discrimination, harassment, and retaliation.

EEOC Guidelines

The U.S. Equal Employment Opportunity Commission (EEOC) has issued guidelines, which apply to employers in all states, stating that employers periodically "should provide [harassment prevention] training to all employees to ensure they understand their rights and responsibilities." Further, the EEOC's 2016 Report from the Select Task Force on the Study of Harassment in the Workplace noted that "Training should be conducted and reinforced on a regular basis for all employees."

Federal Courts

Federal court decisions for years have shown that employers who do not train all employees may lose their ability to avoid punitive damages in a harassment lawsuit. In the *Kolstad v. American Dental Association* case, the U.S. Supreme Court held that employers could avoid punitive damages in harassment and discrimination cases if the employer could show that it had made "good faith efforts" to prevent harassment and discrimination. In determining "good faith efforts," the Court held that:

The purposes underlying Title VII are ...advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.

2019

Many lower courts have ruled that to avoid punitive damages employers must have provided harassment training to their employees. In *Swinton v. Potomac Corporation*, for example, the Ninth Circuit Court of Appeals upheld a punitive damage award of \$1 million in a racial harassment case, noting in part that the company had not educated its workforce on its harassment policy. Likewise, in *Hanley v. Doctors Hospital of Shreveport*, the court upheld a jury's award of punitive damages in a sexual harassment and retaliation case in part because the employer had not provided its employees sexual harassment training.

Decisions by federal courts have shown that employers who fail to provide harassment prevention training may even lose their ability to raise an affirmative defense in a harassment lawsuit. As these examples make clear, employers' views on harassment prevention training must shift from "nice-to-have" to "must-have"—for all employees in all states. This paradigm shift should help reduce the occurrence of workplace harassment and protect employers from liability in high-stakes harassment lawsuits.

Looking Ahead

In 2019, the trend continues as numerous states propose bills mandating sexual harassment prevention training. On February 15, 2019, Illinois Representative Ann M. Williams (D) proposed House Bill 3351, creating the Restaurant Anti-Harassment Act. As proposed, the training, at a minimum, should include the following topics for all employees:

- Definition of sexual harassment and the two forms it can take;
- Explanation of the harmful impact sexual harassment can have on victims, businesses, and those who harass;
- How to recognize conduct that is appropriate, and inappropriate, for work; and
- Explanation of when and how to report sexual harassment.

In addition to the above, employers also must cover the following topics for supervisors and managers:

- Explanation of employer and manager liability for reporting and addressing sexual harassment;

2019

- Instruction on how to create a harassment-free culture in the workplace; and
- Explanation of how to investigate sexual harassment claims in the workplace.

The training program must be specific to the restaurant or hospitality industry and include restaurant, or hospitality-related activities, images, or videos. The training must be available in both English and Spanish. Further, the training may be delivered through a variety of means, including, but not limited to, online, computer, classroom, and remote training.

Under the proposed bill, employers are required to provide the training within 90 days after the effective date of the Act, within 30 days of an employee's employment, and every two years thereafter. The proposed bill is silent as to the required duration of the training.

Finally, the proposed bill requires employers to provide, upon request by the Department of Human Resources, proof of a sexual harassment policy in place and of completing the required training or face a civil violation for failure to do so.

Illinois is the second state in 2019 to propose mandatory sexual harassment prevention training for restaurants. On January 15, 2019, a similar Assembly bill (A4831) was introduced in New Jersey. That bill, if enacted, will require restaurants that employ 15 or more employees to provide sexual harassment training to all employees.

Under the bill, each new employee must receive sexual harassment training within 90 days of employment. Generally, restaurant employees would be required to receive sexual harassment training at least once every five years. For the training to be compliant with the proposed bill, it must:

- Include separate courses for supervisors and supervisees, with appropriate topics selected for each course;
- Include topics specific to the restaurant industry;
- Be interactive, include practical examples, and explain how to file a sexual harassment complaint; and
- Be offered in English and Spanish.

While not mandated, employers may want to maintain records on employee sexual harassment training to avoid claims of non-compliance. The bill further would require

2019

restaurants to adopt sexual harassment policies and include them in their employee handbooks or otherwise provide copies to their employees.

Final Thoughts

Whether and in what form the proposed bills are enacted remains to be seen. Mandatory harassment prevention training is becoming more common, creating a patchwork of legal training obligations for many multi-state employers. Employers would be well-served to develop training programs designed to meet all existing requirements. With mandated training, failure to provide it as required will make an employer much more vulnerable to liability should an employee sue in court for sexual harassment. Where unlawful sexual harassment is found, ignoring the training mandates opens up an employer to punitive damages, which are often several times greater than the employee's compensatory damages.

For more information about Workplace Harassment training options and concerns, please call us at (866) GO-VUBIZ or (866) 468-8249 or email us at info@vubiz.com.

About Vubiz

Vubiz is an award-winning elearning company offering a vast library of modern online courses. We have won consecutive awards from Brandon Hall and Elearning Magazine for our harassment prevention and compliance courses. Since 2002 we've built a solid reputation for effective online training, great value and outstanding customer service. Vubiz also offers an LMS, custom content development, a web-based authoring tool, amongst other solutions. To learn more, visit www.vubiz.com.

Vubiz – elearning that works!