

New Delaware Anti-Sexual Harassment Law Includes Notice Distribution, Training Requirements

By Samia M. Kirmani, Richard I. Greenberg, Kristen M. Baylis &

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Meet the Authors



Samia M. Kirmani

Principal

(617) 367-0025

Samia.Kirmani@jacksonlewis.com



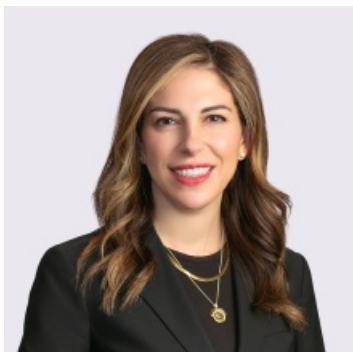
Richard I. Greenberg

(Rich)

Principal

(212) 545-4080

Richard.Greenberg@jacksonlewis.com



A new Delaware law specifically addresses the prohibition against sexual harassment under the Delaware Discrimination in Employment Act (DDEA), sets an affirmative defense for employers, imposes mandatory notice distribution on employers with at least four employees within the state, and provides anti-sexual harassment training requirements for employers with at least 50 employees in the state.

Governor John Carney (D) signed [HB 360](#) into law on August 29, 2018. The new law goes into effect on January 1, 2019.

General Provisions

The DDEA currently prohibits discrimination based on sex, but it does not specifically address sexual harassment. HB 360 creates a new section devoted to sexual harassment.

The new law defines sexual harassment of an employee as an unlawful employment practice when the employee is subjected to:

conduct that includes unwelcome sexual advances, requests for sexual favors, verbal or physical conduct of a sexual nature when: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of employee's employment; (2) submission to or rejection of such conduct is used as the basis of employment for employment decisions affecting an employee; or (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment.

The law covers employers with at least four employees within the state at the time of an alleged violation and it expressly includes the state, the General Assembly, state agencies, and labor organizations. The new law expands the types of workers covered by the DDEA to include state employees, unpaid interns, applicants, joint employees, and apprentices.

Employer Responsibility for Sexual Harassment in the Workplace

Employers will be responsible for sexual harassment of an employee when:

1. A supervisor's sexual harassment results in a negative employment action of an employee;
2. The employer knew or should have known of a non-supervisory employee's sexual harassment of an employee and failed to take appropriate corrective measures; or
3. A negative employment action is taken against an employee in retaliation for the

Kristen M. Baylis

Senior Director of Practice and
Innovation

(303) 876-2217

Kristen.Baylis@jacksonlewis.com

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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.

Affirmative Defense Available to Employers

Under the new law, an employer can avoid liability for harassment by a non-supervisor by proving that:

1. The employer exercised reasonable care to prevent and correct any harassment promptly; and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The availability of this defense highlights the importance of addressing issues of sexual harassment that come to the employer's attention, by whatever means, in a prompt and thorough manner. In addition, HB 360's notice distribution and mandatory training requirements will inform employees of the preventive or corrective opportunities provided to them by their employer. Therefore giving employees multiple reporting avenues and mechanisms in which to file complaints of sexual harassment is strongly encouraged.

Distribution of Information Sheet

HB 360 requires the state Department of Labor to create an information sheet for distribution by employers. The yet-to-be-created information sheet should be distributed to:

- New employees at the commencement of employment
- Existing employees within six months of January 1, 2019 (*i.e.*, by July 1, 2019)

Distribution of the information sheet does not protect an employer from liability, but this provision also would not automatically create liability for an employer in a litigation should the notice not be distributed.

Mandatory Sexual Harassment Training Required

Perhaps of most significance is the law's requirement that employers with at least 50 employees in Delaware provide "interactive training and education to employees regarding the prevention of sexual harassment." Training must be provided on the following schedule:

Who Is Being Trained	When Must They Be Trained
New Staff Employees	Within 1 year of commencement of employment and then every 2 years thereafter; training not required until employee employed for 6 months continuously
Existing Staff Employees	Within 1 year of January 1, 2019, and then every 2 years thereafter

Who Is Being Trained	When Must They Be Trained
New Supervisors	Within 1 year of commencement of employment as a supervisor and then every 2 years thereafter
Existing Supervisors	Within 1 year of January 1, 2019, and then every 2 years thereafter
Current staff employees and supervisors who received training prior to January 1, 2019, consistent with the requirements of Section (h)	Training required again as of January 1, 2020

The training for staff must include all of the following elements:

1. The illegality of sexual harassment;
2. The definition of sexual harassment using examples;
3. The legal remedies and complaint process available to the employee;
4. Directions on how to contact the Department of Labor; and
5. The legal prohibition against retaliation.

In addition, the interactive training for the supervisors must further include all of the following:

1. The specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment; and
2. The legal prohibition against retaliation.

The new law does not mandate the length of the training, but only that the above areas are fully covered during the training. Employers do not count applicants or independent contractors toward the numerosity requirement. Employers are not required to provide training to applicants, independent contractors, or employees employed less than six months continuously. Employment agencies are the only employers required to count and provide training to employees placed by the employment agency under the training requirement.

Employers who provide (or provided) training that meets the requirements of the law before January 1, 2019, will not be required to provide additional training until January 1, 2020.

What to Know

Delaware employers should review their policies to ensure their sexual harassment prevention policies are consistent with the new law. Employers also should keep their eyes open for the Department of Labor's Notice that will need to be distributed.

Delaware's new law is one of a growing number of new state laws enacted in response to the current iteration of the #MeToo movement against sexual harassment and assault. For example, earlier this year, New York enacted broad legislation requiring all employers in the state to provide annual anti-sexual harassment training to all employees, among other things. (For more on the New York law, see our article, [New York State Issues Draft Guidance on Required Sexual Harassment Prevention Policies](#)

and Training.)

This is a great time for employers to update their training programs to meet the new Delaware law's interactive training requirements and to schedule training to ensure they are meeting the law's training compliance dates. Jackson Lewis' Workplace Training Practice Group is available to assist in preparing and presenting interactive training programs consistent with Delaware's training requirements. We further are able to review and update workplace policies, including an employer's sexual harassment prevention policy.

Please contact Jackson Lewis with any questions about this or other workplace developments.

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