

Employee Civility in the #MeToo Era



Investing in Employees and Morale

Sexual Harassment, Training, and Workplace Civility in the #MeToo Era

by
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Effective January 1, 2019, the Delaware Discrimination in Employment Act (DDEA) was amended to require that certain Delaware employers provide mandatory sexual harassment training to their employees. We outline some of the new law’s most important requirements below. But employers are well counseled to provide comprehensive employment training to their employees, even if they are not subject to the new law.

Why Now?

Delaware, along with a handful of other states, now requires that large employers conduct anti-harassment training. But such training has been strongly recommended for decades. Why are states taking affirmative action to require training now? It is undoubtedly a reaction to #MeToo movement, and the eruption of numerous, high-profile claims of quid pro quo harassment lodged by individuals against some of the most powerful men (and women!) in the country. This reality is reflected in the fact that California and New York—two states at the center of the maelstrom—were the first to pass mandatory training laws.

But #MeToo is just a symptom of a broader problem: lack of respectful workplace behavior and a failure to observe traditional boundaries between the personal and professional. Some of the causes are clear. Social media has contributed to the blurring of the boundaries that were once commonplace. Similarly, social discourse has become more coarse, and people are becoming increasingly isolated from others with different social and political views. In short, the workplace is changing. Many of these changes are for the better: our offices are becoming more diverse by the year, and businesses benefit directly from the varied experiences and thoughts contributed by these employees. But increasing diversity also means that we all have to think more critically about what we say, and how our behavior may be perceived by others.

Fostering an inclusive and welcoming environment for all employees increases morale, and directly benefits the employer.

Who Is Required to Train?

Delaware law requires any public or private sector employer with 50 or more employees in the State of Delaware to provide harassment prevention training. In determining whether a business has 50 or more employees, employers should count all full-time and part-time employees, interns and apprentices, but need not count applicants or independent contractors towards the numerosity requirement. The law does not specify what time period to use when determining coverage, but one approach would be to follow the formula applied under various federal employment laws. This means you would be covered if you employed 50 or more employees during 20 or more working weeks in either the current or the preceding calendar year.

Who Is Required to Be Trained?

The training must be completed by all employees who work in the State of Delaware, which includes all full-time and part-time employees, seasonal employees, temporary employees, and interns and apprentices. Further, if an individual works a portion of his or her time in Delaware, even if based in another state, the individual should be trained. Note that new hires do not need to be trained until they have been employed for at least 6 months.

What about Employment or “Temp” Agencies?

Employment agencies are the only employers required to count and provide training to employees placed by them with a third party employer under the new law.

What Do I Do about Employees in Other States?

Only employees who work in Delaware are required to be trained under Delaware law. However, if an individual works a portion of their time in Delaware, even if they’re based in another state, they must be trained.

Employers are also well counseled to remember that high-quality training can be a powerful defense if the business is ever sued. An employee who completes training and then fails to report alleged harassment may be barred from recovery under certain circumstances. In short, even outside of Delaware, training provides protection from the employer, and contributes to employees’ sense of happiness and wellbeing in the workplace.

When Does Training Need To Be Completed?

The new law provides a timetable for when training must be completed. For existing employees, the training must be completed on or before January 1, 2020. Employers who conducted training in calendar-year 2018 receive an extension, and do not have to complete training until January 1, 2021. Following the completion of initial training, and new hires must receive training within one year of commencement of employment. Once the employees have received the initial
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training, they must be retrained on harassment prevention every two years thereafter.

What Must Be Included In the Training?

Under Delaware law, training must be interactive and designed to educate employees regarding the prevention of sexual harassment. Additional requirements differ slightly, depending upon the employee's supervisory status. For non-supervisory staff, the training must cover 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 Delaware Department of Labor; and
5. The legal prohibition against retaliation.

For supervisors (which includes any employee authorized to change the employment status of another employee or who directs an employee's daily work activities), the interactive training must include the above elements and the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment.

Is There A Minimum Number of Training Hours Employees Must Complete?

No, the law does not specify any minimum time as long as the employees receive training that meets or exceeds the minimum standards. As a best practice, we recommend the training session for non-supervisory employees be at least 1.5 hours, and at least 2 hours for supervisors.

What Does "Interactive Training" Mean?

Delaware law requires that all sexual harassment training be interactive. While the law is silent on what would satisfy the "interactive" requirement, a common sense approach would provide that the employee must have the ability to participate in the training. This is also consistent with regulations issued in California. Several examples of employee participation might include:

1. Web-based training, if the employees have an option to submit a question online and receive an answer during or immediately after the training session;
2. Live, in-person training, if the presenter asks the employees questions or gives them time throughout the presentation to ask questions.

Importantly, an individual watching a training video or reading a document, with no feedback mechanism or interaction, would NOT be considered interactive. Officials within the Delaware Department of Labor have echoed this sentiment. This old style of training, which we refer to as "checking the box," is precisely the reason why state legislators stepped in to mandate what is and is not acceptable in terms of training. The old method was not working.

Can an Employer Use a Third-Party Vendor to Provide Training?

Yes, an employer may use a vendor to provide training. While the new law does not specifically require that the vendor possess a license or certification, at a minimum the vendor should be well versed in the requirements of Delaware's sexual harassment law and be able to adequately respond to questions from participants. As an employer, you should thoroughly review any third-party training to ensure it meets or exceeds the minimum standards required under the law.

What Happens If Some Employees Fail to Take the Training, Despite an Employer's Best Efforts to Make It Available?

Employers are required to ensure that all employees receive the required training within the timeframes provided. There are no exceptions under the law for long-term absences, such as a period of leave under the Family & Medical Leave Act. Employers may take appropriate remedies (including disciplinary action, if necessary) to ensure compliance. But be careful not to engage in retaliation for individuals who have a statutorily protected basis for being absent, such as under the FMLA. In these cases, an interactive web-based program may be ideal, as training can be provided on-demand, when an employee returns to the workplace.

Are Employers Required To Pay Employees For The Time Spent In Training?

The new law is silent on this issue, but federal law generally requires that employer-provided training time is counted as regular work hours.

What Type Of Records Must Employers Maintain To Verify Training Compliance?

Again, the law is silent on this issue. We recommend employers keep a signed acknowledgement (including any vendor certification) and a copy of all training records. These records may be helpful in addressing any future complaints or lawsuits.

I'm Concerned; What Next?

There is no reason to be concerned about the new statute. There is still ample time to come into compliance, especially if your organization conducted anti-harassment training in 2018. First, consider your options and determine what works best for your workplace. Live, in-person training is best suited to comparatively small groups of employees (20 to 40) to allow full participation. For large employers, this could mean an extended period of training, and the attendant expenses associated with multiple training sessions.

If you have a large workforce, an online program may be better suited to your needs. Just ensure that the program is high quality, and truly participatory. Employees should be engaged with the material, not sitting blankly in front of a screen. And the ability to ask questions is absolutely essential to compliance with Delaware law.

You may also elect a combination of both approaches. Key employees, or those who have engaged in unprofessional conduct in the past, may be ideal candidates for smaller, in-

person training, while others may benefit from the flexibility of online training. Whatever approach your business elects, ensure that the program receives support from senior leadership. No matter how good your training program, if senior leadership is not behind it, employees will sense that the endeavor is an empty gesture, and you will lose the goodwill and employee morale that can come from this type of investment.

Final Thoughts

Workplace training on abstract concepts like discrimination, respectful workplace behavior, and civility can feel like a burden. In the worst scenarios, you may be educating your employees on how to build a better case. But the reality is that training is an investment in your work force. A good anti-harassment program should make your staff feel empowered and valued. And your managers should feel more confident in their interactions with their subordinates, because they know where the boundaries are, and won't go running scared the next time someone throws around the term "hostile work environment." Do not be deterred by a fear of increased complaints. A small uptick is normal, and actually reflects that you've done a good job. People are coming forward to have their questions answered and hopefully you're also building their confidence that they can trust your human resources department with their concerns.



Lauren Moak Russell is an associate at Young Conaway Stargatt & Taylor, LLP. She specializes in the representation of employers on a range of issues relating to compliance with local, state, and federal labor and employment laws and constitutional provisions. She provides compassionate and responsive counsel, targeted at achieving client goals while minimizing cost and risk. Lauren emphasizes client counseling—on issues ranging from wage and hour compliance, to workplace training and investigations, to effective employee terminations—with the goal of avoiding litigation before it begins. Her counseling practice includes handbook revisions, effective policy implementation, and on-site training on legal compliance. Lauren has developed and conducts specialized in-house training for emerging legal issues including the pregnancy, reproductive rights, and family care provisions of the Delaware Discrimination in Employment Act. One of her current programs outlines the complexities of the #MeToo movement and offers executives essential information on harassment avoidance and modifying corporate culture. Lauren also conducts high-level investigations of discrimination and harassment on behalf of employers.



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