

Delaware Adopts New Anti-Sexual Harassment Law

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The Delaware Discrimination in Employment Act (DDEA) prohibits discrimination based on sex, but historically did not offer protection against sexual harassment. To remedy this gap in the statute, Governor John Carney signed into law a new section of the DDEA to specifically address sexual harassment in the workplace. This amendment of the DDEA will be effective January 1, 2019.

Who and What the Law Governs

This law is applicable to employers with at least four employees within the state. It protects employees and expands the type of covered persons to include state workers, unpaid interns, applicants, joint employees and apprentices. Sexual harassment constitutes an unlawful employment practice when an 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 or rejection of such conduct is used as the basis 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.”

An employer is responsible for sexual harassment of an employee where:

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

Employer Obligation

The Delaware Department of Labor is preparing an information sheet that employers must distribute to new employees at the commencement of employment and to existing employees by July 1, 2019. Employers with at least 50 employees within the state – not including applicants or independent contractors - must provide an interactive training to employees regarding prevention of sexual harassment on the following schedule: **New employees and supervisors** Within one year of commencement of employment and then every two years thereafter; no training required until employed for six continuous months. **Existing employees and supervisors** Within one year of January 1, 2019, and then every two years thereafter.

The interactive training must include these subjects the illegality of sexual harassment;

1. the definition of sexual harassment by use of examples;

2. the legal remedies and complaint process available to the employee;
3. directions on how to contact the Department of Labor; and
4. the legal prohibition against retaliation.

Supervisor training must additionally include the specific responsibilities of a supervisor to prevent and correct sexual harassment.

Employer Defenses

An employer can potentially avoid liability for sexual harassment of an employee if able to prove that the employer exercised reasonable care to prevent and correct any harassment promptly and the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.

Take-Away

Delaware employers must revise their workplace policies to ensure consistency with the revised DDEA. Once the Delaware Department of Labor information sheet is prepared, employers should immediately disseminate it to all employees. Employee training must be implemented or modified to satisfy the new requirements of the DDEA. Note that the training must be interactive, and not merely a passive measure, such as watching a video or reading materials. If properly implemented, these policies and training will help to diminish sexual harassment in the workplace and, if an unfortunate incident does occur, afford the employer with a significant defense.

White and Williams routinely assists its clients with the development and presentation of anti-sexual harassment training programs, investigates harassment allegations and defends employers subject to harassment claims. If you have questions or would like to further discuss your harassment prevention policies, training or procedures, please contact Marc Casarino (casarinom@whiteandwilliams.com; 302.467.4520) or another member of the Labor and Employment Group.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

