

DELAWARE SEPTEMBER 2018 LEGISLATIVE UPDATE (DELAWARE STATE COUNCIL, DELMARVA SHRM & DE SHRM CHAPTERS)

1. Delaware SHRM State Council and Chapters Recognized by Representative Keeley at Governor Carney's Signing of HB 360 – Sexual Harassment

Governor John Carney signed into law HB 360 - Sexual Harassment. Present at the bill signing were Rep. Keeley, Rep. Hansen and Jon McDowell, Delaware State Council Legislative Director. Governor Carney, Rep. Keeley and Rep. Hansen all made brief comments supporting the importance of the bill. In addition, Rep. Keeley acknowledged the valuable input provided by the Delaware State Chamber of Commerce and Delaware SHRM State Council Joint Legislative Initiative for recommending language to make the legislation more effective when operationalized by Delaware employers.

2. Delaware Adopts Law Expanding Sexual Harassment Protections and Requiring Employee Training

On August 29, 2018, Governor John Carney signed into law HB 360 addressing sexual harassment in the workplace. The new law broadly defines, and prohibits, sexual harassment and retaliation. The statute obligates employers (with 4 or more employees) to issue an information sheet on sexual harassment. It also requires larger employers (with 50 or more employees) to provide sexual harassment training for all employees and supervisors, making Delaware the fifth state to statutorily mandate sexual harassment training. The Delaware law will become effective on January 1, 2019.

Basic Principles and Definitions

The new law clarifies that sexual harassment involves “conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Such behavior rises to the level of an unlawful employment practice if submission to the conduct is a condition of employment (either explicitly or implicitly), is the basis of employment decisions, unreasonably interferes with an employee’s work performance, or creates an intimidating, hostile, or offensive working environment.

The statute makes an employer liable for acts of sexual harassment when: (1) the employer knew or should have known of the harassment and failed to take corrective measures; (2) the harassment perpetrated by a supervisor results in a “negative employment action” against an employee; or (3) “[a] negative employment action taken against an employee in retaliation” for filing a discrimination charge, participating in an investigation, or testifying in any proceeding about sexual harassment. “Negative employment action” is expansively defined to mean any “action taken by a supervisor that negatively impacts the employment status of an employee.” Depending on how this term is interpreted by agencies and courts, this definition could theoretically cover a wide range of employer decisions, perhaps wider than currently encompassed by the federal framework. The law recognizes an affirmative defense—similar to the Faragher/ Ellerth defense under federal law—for employers that can show that they exercised reasonable care to prevent and correct harassment and that the complaining employee unreasonably failed to take advantage of the employer’s preventative or corrective opportunities.

Notably, the definition of “employee” is also quite expansive. Under the Delaware law, an “employee” is “an individual employed by an employer and includes state employees, unpaid interns, applicants, joint employees, and apprentices.” The Delaware statute’s inclusion of unpaid interns, applicants, and apprentices in the definition of employee sets it apart from the sexual harassment laws of other states.

Employee and Supervisor Training Requirement

While many states have laws encouraging employers to provide anti-harassment training to their employees, Delaware now joins the short list of states that require sexual harassment training. Under the new law, employers with 50 or more employees must provide all employees with interactive training and education on the prevention of sexual harassment. For purposes of this subsection, the statute explicitly excludes applicants and independent contractors from numerous requirements; in other words, employers do not count these individuals when determining if they have the 50 employees sufficient to trigger the

training obligation. Additionally, employers need not provide training to applicants, independent contractors, or employees who are employed less than six months continuously. The law also clarifies that only employment agencies must “count and provide training to employees placed by” such agencies.

Employers covered by the training requirement must meet the following requirements:

- They must provide employees with interactive training and education on the prevention of sexual harassment.
- Training must be conducted for new employees within one year of the 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).
- The training topics must: (1) address the illegality of sexual harassment; (2) define sexual harassment, with examples; (3) describe the legal remedies and complaint process available to the employee; (4) direct employees how to contact the Delaware Department of Labor; and (5) instruct employees that retaliation is prohibited.
- 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.
- This supplemental training must cover the specific responsibilities of a supervisor in preventing and correcting sexual harassment as well as the legal prohibition against retaliation.
- These employee and supervisor training programs must be repeated every two years.

Notice Requirement

Under the new law, covered Delaware employers must give notice to employees of their right to be free from harassment at work, via an information sheet to be created by the state Department of Labor. The notice will address the same five topics to be covered in the mandatory employee training. Employers must distribute the information sheet, either physically or electronically, to new hires at the commencement of employment. Employers must provide the notice to existing employees by July 1, 2019.

Conclusion

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 sexual harassment training to all employees and created its own Sexual Harassment Information Sheet addressing the five required areas. (To view New York City's Information Sheet, see https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x11.pdf). As the new law takes effect in a few short months, Delaware employers should take steps promptly to prepare for compliance. All covered employers should review their anti-harassment policies and procedures and should keep an eye out for the Delaware Department of Labor's Information Sheet. Employers subject to the interactive training requirements additionally should consider revisiting and updating any existing training protocols, or otherwise identifying a training program that satisfies all of the statute's requirements.

3. Delaware SHRM Joint Legislative Initiative Committee Contact Information

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This publication is the result of the combined efforts of members of Delaware SHRM State Council, DE SHRM and DelMarVa SHRM Chapters. Any questions or suggestions should be referred to members of the Delaware SHRM State Joint Legislative Initiative Committee. This Legislative Update is for informational purposes only. It is strongly recommended that you consult with an attorney for legal advice.