

To Train or Not to Train? -That is the Question. The Answer is TRAIN!

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Neither Title VII of the Civil Rights Act of 1964 nor the New Jersey Law Against Discrimination require employee or managerial training on discrimination, harassment, or retaliation. Just because it is not required, does that mean employers should not provide training? No!

The Equal Employment Opportunity Commission has issued enforcement guidance on harassment in the workplace and further expanded its guidance regarding a defense available to employers. In matters where it is alleged that a supervisor created a hostile work environment, which had a harmful effect on an employee but did not result in a tangible employment action like a discharge or a demotion, the EEOC guidance **requires** an employer to prove it **exercised reasonable care to prevent** any harassment and that the employee unreasonably failed to take advantage of the policies in place to prevent harassment. The guidance advises that “federal EEO law does not specify particular steps an employer must take to establish that it exercised reasonable care to prevent and correct harassment.” However, the steps “**usually consist of promulgating a policy against harassment establishing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities, and monitoring the workplace to ensure adherence** to the employer policy.” Accordingly, at a minimum, having established policies, processes, training and monitoring in place can support an employer’s defense to allegations of discrimination, harassment and/or retaliation.

In New Jersey, if an employer wants to assert an affirmative defense to a hostile work environment claim it should:

- Create an anti-discrimination/anti-harassment policy (make it an employee’s obligation to report problems);
- Document problems and have accurate evaluations;
- Circulate the policy, provide training on discrimination and harassment and the policy;
- Answer any questions about the policy;
- Follow the policy – conduct an appropriate investigation; and
- Don’t retaliate, including through constructive discharge.

Aguas v. State of New Jersey, 220 N.J. 494 (2015).

The EEOC further indicates that for training to be “effective”, it should:

- Include an explanation of the employer’s anti-harassment policy and complaint process including any alternative dispute resolution, confidentiality and anti-retaliation protections;
- Set forth examples of prohibited conduct;
- Provide information regarding employees’ rights if they experience, observe, become aware of or report conduct they believe may be prohibited;
- Include information to managers and supervisors on how to prevent, identify, stop, report and correct harassment;
- Be tailored to the workplace and workforce;
- Be provided on a “regular basis” to all employees; and
- Be Written in a clear and easy to understand format.

However, New York State law requires that employers of one or more employees must conduct sexual harassment prevention training for all employees each year. New York City Law also has training requirements for employers.

The Commission has developed an online training that will satisfy both the New York State and New York City sexual harassment prevention training requirements.

Training must:

- Be interactive;
- Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Include examples of conduct that would constitute unlawful sexual harassment;
- Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- Include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

<https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training>

Takeaway: Providing training is a significant step toward not only preventing discrimination and harassment, but also providing employers the ability to assert an affirmative defense to a harassment, discrimination or retaliation claim. Our attorneys regularly provide annual anti-harassment/anti-discrimination training for our clients in interactive sessions using a variety of methods, including PowerPoint, lecture, videos, and group interaction. For more information, contact [Wilentz Employment Law Team](#).

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