



**FSCNY ANNUAL CONFERENCE & EXPO**  
THE NEW YORK MARRIOTT AT THE BROOKLYN BRIDGE  
BROOKLYN, NY >> MAY 16, 2019

# HOT TOPICS IN LABOR AND EMPLOYMENT LAW

*Training the Trainer:  
New Workplace Laws and Training  
Requirements in the post-#MeToo Era*

William H. Ng, Esq.  
Kimberly Dobson, Esq.  
Paul R. Piccigallo, Esq.



**WE  
TAKE  
YOU  
FURTHER**

## Presented by:



**William H. Ng, Esq.**  
Shareholder  
[wng@littler.com](mailto:wng@littler.com)  
631-247-4707



**Kimberly N. Dobson, Esq.**  
Senior Associate  
[kdobson@littler.com](mailto:kdobson@littler.com)  
631-247-4734



**Paul R. Piccigallo, Esq.**  
Senior Associate  
[ppiccigallo@littler.com](mailto:ppiccigallo@littler.com)  
212-497-6842





**WE  
TAKE  
YOU  
FURTHER**

## About Littler

- Littler represents management in all aspects of employment and labor law and serves as a single-source solution provider to the global employer community.
- Consistently recognized in the industry as a leading and innovative law practice. Littler has been litigating, mediating and negotiating some of the most influential employment law cases and labor contracts on record for over 70 years.
- Littler Global is the collective trade name for an international legal practice, the practicing entities of which are separate and distinct professional firms.

For more information visit [littler.com](http://littler.com)



**WE  
TAKE  
YOU  
FURTHER**

## Agenda

- Recapping #MeToo and other recent developments
- Reviewing NY State and City anti-sexual harassment legislation, including required action items, past and upcoming deadlines
- Frequently asked questions, and best practices







- Training is not legal advice
- Potentially offensive material is for learning purposes only
- Humor does not mean that we take issues lightly





**WE  
TAKE  
YOU  
FURTHER**



**Recap:  
How did we get here?**



## EEOC's Heightened Focus

- Preventing systemic harassment has been one of the EEOC's six "national priorities" since 2012
  - EEOC Strategic Enforcement Plan FY 2017-2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>
  - June 2016 EEOC Report of the Select Task Force on the Study of Harassment in the Workplace, available at [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf)
  - January 2017: EEOC's Proposed Enforcement Guidance on Unlawful Harassment
  - November 2017: EEOC's Promising Practices for Preventing Harassment, available at <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>





**WE  
TAKE  
YOU  
FURTHER**

## FY 2018 EEOC Enforcement Statistics

- FY 2018 to date vs. FY 2017:
  - Total EEOC sexual harassment charges up 12%
  - EEOC has 41 sexual harassment lawsuits – more than 50% increase
  - Reasonable cause findings in nearly 1,200 charges – 25% increase
  - \$70 million recovered in sexual harassment cases, vs. \$47.5 million

Source: [https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)



**WE  
TAKE  
YOU  
FURTHER**



# New York State's Response



**WE  
TAKE  
YOU  
FURTHER**

## New York State: Coverage of Non-Employees

- New NYS Human Rights Law § 296-d, effective **April 12, 2018**:
  - An employer may be liable for sexual harassment of **non-employees** where it knows or should know that harassment is occurring in its workplace and fails to take immediate and appropriate corrective action







## New York State: Mandatory Arbitration

- New CPLR § 7515: Mandatory arbitration clauses prohibited as to sexual harassment claims, effective **July 11, 2018**
  - But note: § 7515(b)(1) anticipates preemption by the FAA and other statutes – see *Epic Systems v. Lewis* (May 21, 2018)
  - Also: CBAs will control where there is a conflict
  - Watch for clauses that reference arbitration under the CPLR (vs. the FAA); and watch choice of law
  - Industry factors may influence employer decisions





**WE  
TAKE  
YOU  
FURTHER**

## New York State: Settlement of Harassment Claims

- New CPLR 5003-b: Release agreement requirements, effective **July 11, 2018**:
  - If agreement 1) involves a settlement of a sexual harassment claim and also 2) requires non-disclosure of the “underlying facts and circumstances” of that claim, then the Complainant
    - Must have a *non-waivable* 21 day period to consider whether to agree to the non-disclosure, *plus* a 7 day revocation period, *and*
    - Must specifically affirm a preference for non-disclosure after 21 days
    - NYS FAQ: unlike ADEA waiting period which can appear in the same agreement, a separate agreement should be executed after the expiration of the 21-day consideration period before NDA can be enforceable. See <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers>
  - CPLR § 5003-b does not address confidentiality/non-disclosure as to the fact of the agreement, the amount paid, or claims other than sexual harassment
  - Note the separate requirement under Internal Revenue Code § 162(q) (from the federal Tax Cuts and Jobs Act of 2017) – no deduction for damages or fees paid in connection with sexual harassment settlements that include NDAs





**WE  
TAKE  
YOU  
FURTHER**

## **New York State: Mandatory Policy Elements**

- New Labor Law § 201-g: Mandatory anti-harassment policy elements, effective **October 9, 2018**
  - Prohibit sexual harassment and provide examples of prohibited conduct
  - Include information concerning federal, state and local law **and the remedies available to victims of sexual harassment**
  - **Include a standard complaint form**
  - Include a procedure for the timely and confidential investigation of complaints and **ensure due process for all parties**
  - **Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially**
  - State that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals engaging in it and supervisors who knowingly allow it to continue
  - State that retaliation against those who complain of sexual harassment or participate in a proceeding under the law is unlawful.



**WE  
TAKE  
YOU  
FURTHER**

## **New York State: Mandatory Training**

- Mandatory annual anti-harassment training, beginning **October 9, 2018**
  - Must be provided to all employees who work in New York State by **October 9, 2019** and annually thereafter
  - New hires should be trained “as soon as possible”
  - Content must include:
    - An explanation of sexual harassment and examples of prohibited conduct
    - Information concerning federal, state and local law and the remedies available to victims of sexual harassment
    - Information about employees’ rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
  - Must be interactive
- New Finance Law § 139-l, effective **January 1, 2019** - entities bidding for NYS contracts must annually certify compliance with training and prevention requirements





## New York State: Model Forms

- Governor Cuomo, through executive order – not through the regulatory process - published draft policy and training materials, and then “final” model policy and training materials on October 1, 2018
- Model materials are available at: <https://www.ny.gov/combating-sexual-harassment-workplace/employers>
- Models exceed the statutory requirements in several respects:
  - Detail of internal complaint and investigation procedure
  - Detail of agency processes and depth of legal discussion
  - Examples of behavior that may constitute sexual harassment
  - Set up of model complaint form



**WE  
TAKE  
YOU  
FURTHER**



# New York City's Response





## New York City Council Legislation

- NYC Human Rights Law expanded effective **May 9, 2018**:
  - Statute of limitations for “gender-based harassment” extended from one year to three years for administrative claims
  - Now covers employers of all sizes (previously, at least 4 employees)
- New NYC Admin. Code § 8-107(30)(c) – posting/policy requirement effective **September 6, 2018**:
  - Post “anti-sexual harassment rights and responsibilities” poster in English and Spanish – available at <https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarassNotice-8.5x11.pdf>
  - Distribute information sheet OR company handbook to new hires containing the same information that is in the poster

# WE TAKE YOU FURTHER

## New York City: Required Posters

### STOP SEXUAL HARASSMENT ACT NOTICE

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster and as an information sheet distributed to individual employees at the time of hire. This document satisfies the poster requirement.

#### The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to \$250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, require the violator to undergo training, and mandate other remedies such as community service.

#### Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

#### Some Examples of Sexual Harassment

- Unwelcome or inappropriate touching of employees or customers
- Threatening or engaging in adverse action after someone refuses a sexual advance
- Making lewd or sexual comments about an individual's appearance, body, or style of dress
- Conditioning promotions or other opportunities on sexual favors
- Displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- Making sexual remarks or derogatory comments based on gender

#### Retaliation is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak

out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

#### Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718-722-3134 or visit [NYC.gov/HumanRights](http://NYC.gov/HumanRights) to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

#### State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law, where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at [www.dhr.ny.gov](http://www.dhr.ny.gov).

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at [www.eeoc.gov](http://www.eeoc.gov).



**NYC** Commission on Human Rights  
BILL DE BLASIO Mayor  
CARMELO R. MALABU Commissioner

[www.nyc.gov/humanrights](https://www.nyc.gov/humanrights)

### AVISO SOBRE LA LEY PARA DETENER EL ACOSO SEXUAL

Todos los empleadores deben proporcionar un aviso por escrito sobre los derechos de los empleados de conformidad con la Ley de Derechos Humanos de la Ciudad de Nueva York mediante un afiche exhibido y una hoja de información distribuida a cada empleado en el momento de la contratación. Este documento cumple con el requisito de afiche.

#### La Ley de Derechos Humanos de la Ciudad de Nueva York

La Ley de Derechos Humanos de la Ciudad de Nueva York, una de las leyes más rigurosas contra la discriminación del país, protege a todas las personas contra la discriminación debido al género, lo que incluye el acoso sexual en el lugar de trabajo, la vivienda y espacios públicos, como tiendas y restaurantes. Quienes infrinjan esta ley pueden ser responsables de sanciones civiles de hasta \$250,000 en el caso de una infracción intencionada. La Comisión también puede evaluar concederle a la víctima una indemnización por daños y perjuicios debido a angustia emocional y otros recursos, exigirle al infractor asistir a una capacitación y ordenar otras medidas, como servicio comunitario.

#### El Acoso Sexual Según la Ley

El acoso sexual, una forma de discriminación en función del género, es el comportamiento físico o verbal no deseado en relación con el género de una persona.

#### Algunos Ejemplos de Acoso Sexual

- Tocar a los empleados o clientes de manera inapropiada.
- Amenazar o actuar de manera adversa luego de que una persona rechaza una insinuación sexual.
- Hacer comentarios lascivos o sexuales sobre el aspecto, cuerpo o la forma de vestir de una persona.
- Condicionar ascensos u otras oportunidades en función de favores sexuales.
- Mostrar imágenes, dibujos o graffiti pornográfico en computadoras, correos electrónicos, teléfonos celulares, tableros de anuncios, etc.
- Hacer comentarios sexistas o despectivos en función del género.

#### La Ley Prohíbe Represalias

Es contrario a la ley que un empleador tome medidas en su contra por oponerse o expresarse en contra del acoso sexual en el lugar de trabajo. La Ley de Derechos Humanos de la Ciudad de Nueva York prohíbe a los empleadores tomar represalias o discriminar "de cualquier forma a una persona" por oponerse a una práctica discriminatoria ilegal. Las represalias pueden manifestarse a través de acciones directas, como despidos o, como un aumento en la carga de trabajo o la transferencia a un lugar menos deseable. La Ley de Derechos Humanos de la Ciudad de Nueva York protege contra las represalias a las personas que creen de buena fe que el comportamiento de su empleador es ilegal, incluso si resultan estar equivocadas.

#### Denuncie el Acoso Sexual

Si cree que es víctima de acoso sexual, infórmele lo antes posible a un gerente, al representante de igualdad de oportunidades laborales de su lugar de trabajo o al Departamento de Recursos Humanos.

Denuncie el acoso sexual ante la Comisión de Derechos Humanos de la Ciudad de Nueva York. Llame al 718-722-3131 o visite [NYC.gov/HumanRights](http://NYC.gov/HumanRights) para saber cómo presentar una queja o denunciar un acto de discriminación. Usted puede presentar una queja de forma anónima.

#### Recursos del Gobierno Estatal y Federal

El acoso sexual también es ilegal en virtud de la ley estatal y federal.

Para presentar una queja ante la División de Derechos Humanos del Estado de Nueva York, visite el sitio web de la División en [www.dhr.ny.gov](http://www.dhr.ny.gov).

Para presentar cargos ante la Comisión para la Igualdad de Oportunidades en el Empleo (EEOC) de los EE. UU., visite el sitio web de la EEOC en [www.eeoc.gov](http://www.eeoc.gov).



**NYC** Comisión de Derechos Humanos  
BILL DE BLASIO Alcalde  
CARMELO R. MALABU Presidente/Comisario

[www.nyc.gov/derechoshumanos](https://www.nyc.gov/derechoshumanos)





**WE  
TAKE  
YOU  
FURTHER**

## New York City: Mandatory Training

- New NYC Admin. Code § 8-107(30)(a) - mandatory annual anti-harassment training, beginning **April 1, 2019**
  - All employees who work at least 80 hours per calendar year, including interns, after completion of 90 days' employment; also independent contractors who have not otherwise been trained and meet the 80 hour/90 day thresholds
  - Must be interactive: participatory, but not live or in-person
  - Required content: all New York State content *plus*
    - Prohibition of retaliation and examples of retaliation
    - **Information concerning bystander intervention, including resources explaining how to engage in it**
    - Specific responsibilities of supervisory and managerial employees in preventing sexual harassment and retaliation
  - Model program forthcoming
  - Recordkeeping for three years
- Those who contract with the City will need to annually certify compliance



## New York City: Bystander Intervention Resources

- Training individuals who are not themselves the target of harassment to intervene and stop the harassment
  - Major issue on campuses and in certain #MeToo cases that were widely publicized
  - Bystander training may be more effective than harassment prevention training itself, according to some sources:
    - <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html>
    - <https://search.proquest.com/openview/f252c2e8f0064718f33e4e8f968399cc/1?pq-origsite=gscholar&cbl=7561>



**WE  
TAKE  
YOU  
FURTHER**

# What Is Unlawful Harassment?

State and federal law prohibit employment discrimination and harassment on the basis of any protected category





**WE  
TAKE  
YOU  
FURTHER**

# What Is A Protected Category?

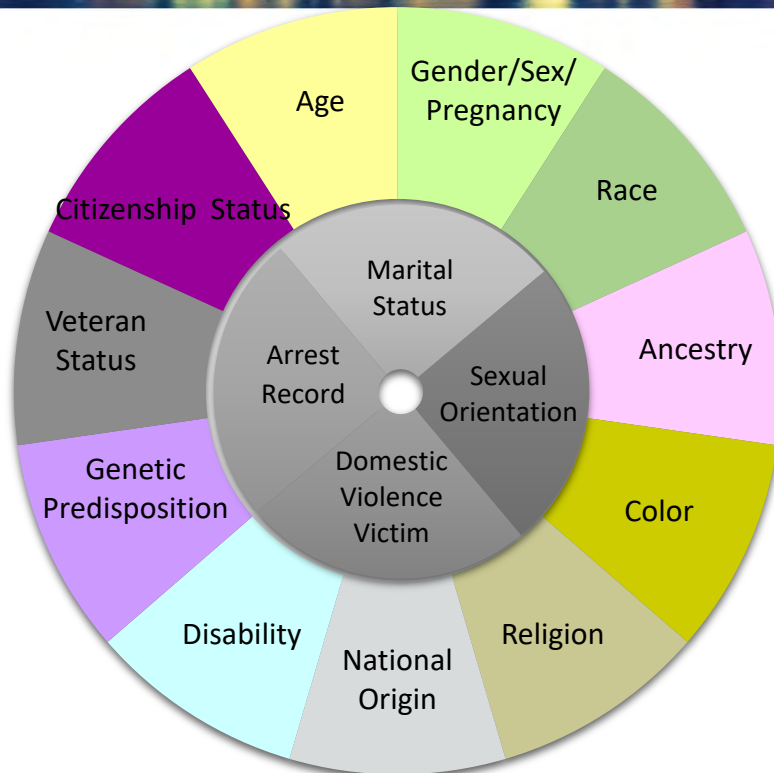
It's Not Just  
About Sex and  
Gender





**WE  
TAKE  
YOU  
SERIOUSLY**

# What Is A Protected Category?



State or  
Local



## Two Types Of Harassment

### Economic



### Environmental





# Economic Harassment

**WE  
TAKE  
YOU  
FURTHER**

- Taking any tangible employment action based on an agreement or refusal to engage in sex, dating, etc.
- Typically involves a threat or promise of a benefit linked to sex
  - “Quid Pro Quo”



**WE  
TAKE  
YOU  
FURTHER**

# Economic Harassment

Always involves a Supervisor



Why?

**“It’s an abuse of power”**







# Environmental Harassment

Unwelcome conduct based on someone's membership in a protected category that unreasonably:

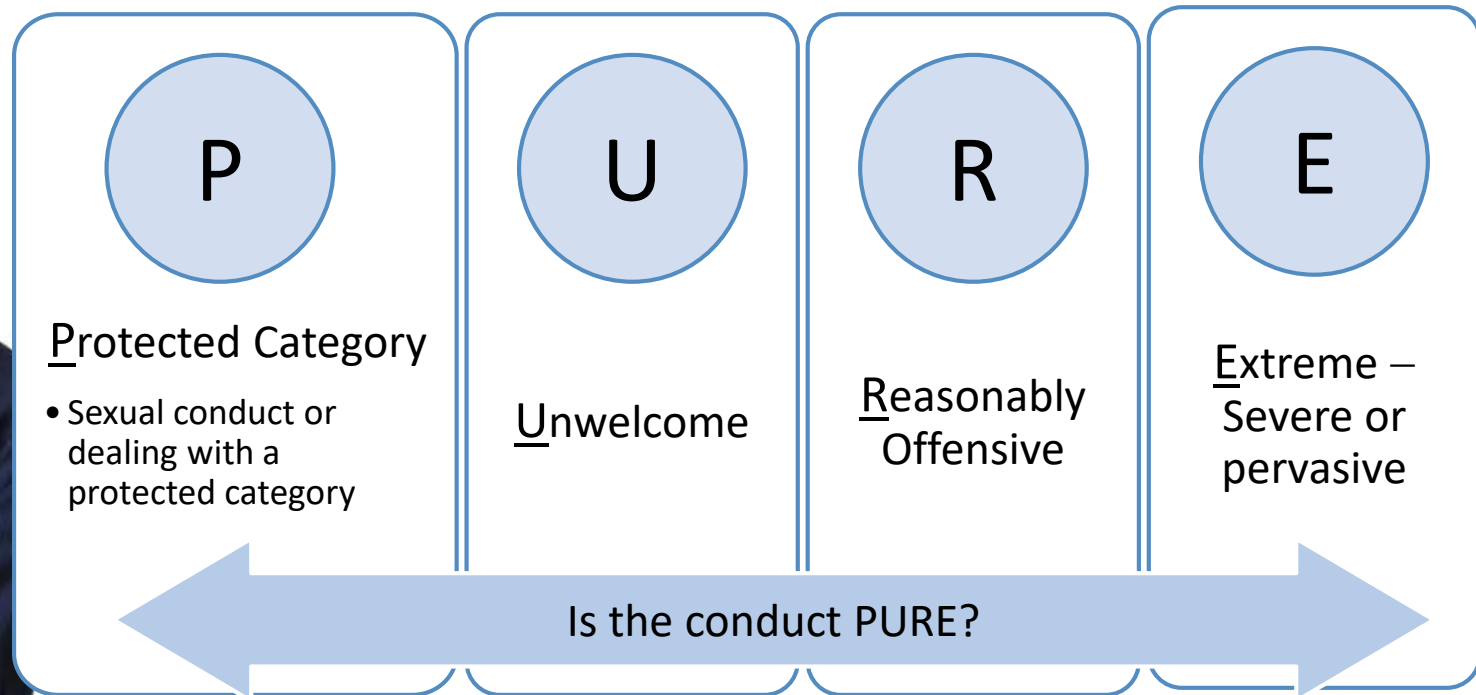
- Interferes with an employee's job performance, or
- Creates an intimidating, hostile, or offensive work environment





**WE  
TAKE  
YOU  
FURTHER**

# *A Simple Test: 4 elements*







## Review: Required Action Items

- Review and revise arbitration provisions and release agreements
- Adopt or update anti-harassment policies to meet the Minimum Standards available at:  
<https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf>
  - Address non-employees
  - Supervisory responsibilities
  - List of external forums and descriptions of remedies
  - Due process
  - Standard complaint form
  - Posters (for New York City)
- Implement or update internal training programs, anticipating NYC's requirements
- Review bidding requirements (if you are a State or City contractor)



**WE  
TAKE  
YOU  
FURTHER**



## Best Practices





**WE  
TAKE  
YOU  
FURTHER**

## Best Practice Issues

- What are the implications of singling out sexual harassment from other types of workplace discrimination?
- Will adopting a training program/distributing more information also increase the number of complaints? How do we deal with increased complaint volume?
- Will training annually cause employees to just tune out the training? How do we promote engagement?





**WE  
TAKE  
YOU  
FURTHER**

## 1. Don't Single Out Sexual Harassment

- From a diversity and inclusion perspective, treating sexual harassment differently from other workplace discrimination may send the wrong message
- Take the opportunity to address other concerning conduct, known hotspots
- Consider how your language may unintentionally reinforce stereotypes:
  - Reconsider terms like “harasser” and “victim”; don’t assume the conclusion before investigating
  - Don’t overemphasize legality; focus on promoting respectful conduct, especially in a global setting
  - Avoid stereotyping by gender or gender identity; neutralize your policy language







**WE  
TAKE  
YOU  
FURTHER**

## 2. Brace Yourself, and Build Capacity

- Expect complaints to rise, now that #MeToo has sparked a dialogue; not all may be substantiable, timely or even legal in nature

### Recognize the opportunity:

- Demonstrate that there is a process
- Head off problematic behavior before little things pile up
- Consider training beyond what the statutes address: i.e., building up HR to respond properly
- Consider conciliation processes





**WE  
TAKE  
YOU  
FURTHER**

## How Do You Build HR's Capacity?

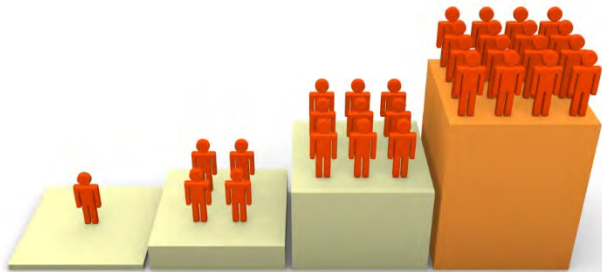


- Train HR to act properly and promptly – not “when we get to it” – and to reach conclusions; models indicate how the State will evaluate investigations
- Encourage a “speak-up” culture
- Consider inherent power dynamics – applies no less to HR than others
- If your organization lacks the training, time or resources to investigate properly, consider outsourcing





# What About Management?



- Leaders must embody respect in the workplace, not delegate it to HR or others
- Leaders must model what inclusion and response culture look like
  - Where appropriate, be transparent
- Invest in training leaders to overcome past conditioning
  - Focus both on individuals and on leadership team dynamics
  - Settlement is not an off-ramp



## Focus on Reporting Mechanisms & Retaliation

- Retaliation can include deterring would-be complainants (“pre-taliation”)
- Retaliation claims can proceed even if the underlying complaint wouldn’t support a legal claim – remember this where #MeToo revives claims after a long time
- Think critically about where the landmines are
- Support leaders in overcoming behaviors that stifle complaints
- Use bystander training to combat retaliatory instincts







**WE  
TAKE  
YOU  
FURTHER**

### 3. Foster Engagement

- Focus on respect, civility and professionalism, rather than “anti-harassment”
- Vary the training so that people are not doing the same thing every year
- Highlight behaviors you want to encourage:
  - “What does a respectful environment look like?”
  - “What is appropriate workplace communication?”
  - “Identify behaviors that build constructive work relationships.”
  - “What does inclusion mean to you?”





**WE  
TAKE  
YOU  
FURTHER**

## Littler's Training Options

- **LIVE IN-PERSON TRAINING:** Littler attorneys regularly lead live, in-person trainings on anti-harassment and anti-discrimination laws and improving workplace culture. Company handbook policies will be incorporated into our training so that employees are reminded of internal policies first and foremost. This training, like all Littler trainings, is very interactive and includes demonstrative videos, slides and images. We provide a one hour employee training and a two hour manager training.
- **LIVE WEBINAR TRAINING:** Littler attorneys regularly lead live webinar trainings, which mirror the live in-person training described above but is conducted remotely. Employees can log on from their own computers or a conference room to view the training, engage in discussion and interact with the live Littler attorney leading the training remotely. For an added fee, this webinar can be recorded and provided to the employer to use as a training tool for two years.
- **SEXUAL HARASSMENT TRAINING VIDEO:** Littler has a 30 minute sexual harassment video that incorporates much of the state's "model training" and meets the minimum standards required by State and City law. The video outlines New York sexual harassment laws, standard internal policies and standard complaint options for every employee. The video serves as an H.R. tool for employers and comes with a two page guide and opportunities within the video to pause and engage in discussion to satisfy the interactive requirement. This video is meant to be presented in-house with internal H.R. or other personnel present to answer questions. Clip available at <https://vimeopro.com/littlerlearninggroup/nysxhr-sample>
- **MATERIALS LICENSE AND TRAIN THE TRAINER:** The in-person training materials are also available for purchase for internal use via a Materials License and a Train-the-Trainer option. Attorneys regularly consult with H.R. and in-house counsel in order to improve internal training products and plans or provide guidance on how to present the first and third options above on their own.
- **E-LEARNING PROGRAM:** An online, self-paced program co-developed by LLG and eLearning provider [Kantola Training Solutions](#). The program can be accessed by computer, phone, etc., and tracks employee completion for the employer.





**WE  
TAKE  
YOU  
FURTHER**

Thank you!