

DCR Report and Proposed Legislation Aim to Enhance Harassment Protections

A Preview of Recommended Mandatory Training, Policies, Reporting and Investigation Best Practices

by Kirsten Scheurer Branigan and Carole Lynn Nowicki

On Feb. 18, 2020, the New Jersey Division on Civil Rights, Office of the Attorney General issued a comprehensive report, entitled “Preventing and Eliminating Sexual Harassment in New Jersey – Findings and Recommendations from Three Public Hearings” (DCR Report), based on information culled from a series of hearings held in September 2019.¹ The DCR’s goal was to address the problem of sexual harassment in the workplace and places of public accommodation and housing. The DCR Report contains recommendations for legislative amendments, additional educational outreach by the DCR, and best practices.² Although the primary focus of the DCR Report was sexual harassment, the DCR issued recommendations based on all of the protected classes under the New Jersey Law Against Discrimination (race, creed, color, national origin, age, ancestry, nationality, marital status, domestic partnership status, civil union status, sex, pregnancy, breastfeeding, gender identity or expression, disability, military service, affectional or sexual orientation, atypical or cellular blood trait, genetic information).³

The same day the DCR Report was issued, the Office of Governor Phil Murphy released Proposals to Strengthen New Jersey’s Anti-Harassment Laws (Proposed Legislation) that mirror the DCR recommendations.⁴ The Proposed Legislation, if enacted, will codify and clarify the existing common law in certain areas, but also significantly expand protections under the NJLAD in other respects. The Proposed Legislation encompasses the DCR Report’s recommendation that sexual harassment protections be expanded to include paid and unpaid interns and domestic workers.⁵ However, as stressed in the DCR Report, many of the recommended legislative amendments contain only

minimum requirements, and employers are encouraged to implement greater protections through the recommended best practices.⁶ As summarized below, both the DCR Report and the Proposed Legislation set forth more enhanced requirements for “larger” employers, which is defined in the Proposed Legislation as those with 50 or more employees.⁷

Policy Requirements for All Employers, Enhanced Requirements for Large Employers

Both the DCR Report and Proposed Legislation stressed the importance of strong anti-harassment policies and their broad dissemination. Under the Proposed Legislation, all New Jersey employers would be required to implement written harassment and anti-discrimination policies covering interactions with employees, vendors, suppliers, customers, clients, and patrons within one year from the date of enactment.⁸ The policies need to be distributed upon hire and then annually or any time the policy is updated.⁹ Further, the Proposed Legislation mandates dissemination of the policy to any employee making a complaint and to those participating in an investigation.¹⁰ Policies have to identify harassment and discrimination as misconduct, state that such conduct will not be tolerated by the employer and provide definitions and examples.¹¹ They must provide the internal complaint filing process and information about how to file with the DCR.¹² The policies also need to protect employees against retaliation, include examples of retaliation, and provide the statute of limitations for a claim of harassment or discrimination under the NJLAD.¹³ Additional components include potential consequences for violations, and a statement of the employer’s commitment to prompt, thorough and

impartial investigations of complaints.¹⁴ Policies must also provide that supervisors and management-level employees who allow discrimination and harassment to occur will be subject to discipline.¹⁵

The Proposed Legislation sets forth requirements for employers with 50 or more employees working both within and outside New Jersey (large employers) and others for employers with fewer than 50 employees (small employers).¹⁶ Large employers must provide multiple avenues in the policies for complaining employees to report a violation, describe the investigation process and translate policies to the primary language of employees.¹⁷ Small employers have to offer policies in the primary language of employees only if the DCR has made the model policy available in that language.¹⁸ Additionally, large employers must provide the policies when employees are promoted and must also post the policies on their websites.¹⁹

Interactive Training Requirements for All Employers, Live Training Requirements for Large Employers

The DCR Report emphasized the importance of meaningful training to reinforce prevention policies and recommended live training whenever possible.²⁰ The Proposed Legislation requires all employers to conduct interactive training that must be participatory.²¹ Live, in-person training that allows for question and answer exchanges is mandatory for large employers and is encouraged, but not mandatory, for small employers.²² Large employers need to have the training interpreted to employees' primary languages; small employers only need to offer the trainings in other languages if the DCR has made online training modules available in such languages.²³

While the Proposed Legislation charged the DCR to publish training in one- and two-hour online training modules (one hour for all employees and two hours for supervisors), only small employers would be permitted to use these modules to fulfill the requirements.²⁴ Large employers would not be permitted to use the DCR's module training to fulfill the Proposed Legislation's requirements.²⁵ Employers would have one year to implement new training programs and would be required to provide the training to new employees within 90 days of hire and every two years thereafter.²⁶

Both the DCR Report and Proposed Legislation iden-

tified the need for several components to the training, including supervisor responsibilities and information on bystander intervention. The training will include, at minimum: (1) a statement that unlawful discrimination and harassment in the workplace will not be tolerated and will be considered forms of employee misconduct, and that sanctions will be enforced for violations and against supervisory and managerial personnel who knowingly allow such behavior to continue; (2) a definition of unlawful discrimination and unlawful harassment; (3) examples of discriminatory and harassing behaviors prohibited by the nondiscrimination policy; (4) a description of the process for filing internal discrimination or harassment complaints; (5) directions on contacting the DCR if employees believe their rights have been violated; (6) a description of the prohibition on retaliation against those who disclose, report, participate in an investigation of, or otherwise challenge such discrimination or harassment; (7) examples of retaliatory behaviors prohibited by the nondiscrimination policy; and (8) information concerning bystander intervention.²⁷ Additional training topics for supervisors will include the specific responsibilities of a supervisor regarding the prevention of discrimination and harassment and the prohibitions against retaliation, as well as measures and corrective actions to appropriately address complaints and instances of discrimination, harassment, and retaliation.²⁸

Reporting Record Retention

Consistent with the DCR Report, the Proposed Legislation would also require large employers to file annual reports with the DCR setting forth all internal complaints of harassment, discrimination and retaliation, and to retain records of those complaints for at least three years.²⁹ Large employers must also keep records of trainings for three years.³⁰

Severe or Pervasive Totality of Circumstances

While New Jersey is not overriding the long-used "severe or pervasive" standard, there were concerns noted in the DCR Report about a misapplication of the standard. The Proposed Legislation, therefore, seeks to clarify what a plaintiff must show in terms of "severe or pervasive" conduct to establish "hostile environment harassment."

Specifically, the totality of the circumstances would need be fully considered. There must be an examination of the cumulative effect of all incidents of harassing conduct to be considered as a whole, rather than considering individual incidents in isolation. While *de minimis* incidents such as petty slights or trivial inconveniences shall not, by themselves, be actionable under the NJLAD, a court shall consider all evidence, including *de minimis* or isolated incidents, when evaluating the totality of the circumstances and may not ignore or filter out abusive or offensive language, jokes, teasing, offensive comments or isolated incidents.³¹ Moreover, a single incident of harassing conduct may be sufficiently severe to create a triable issue of fact.

Additionally, although the perspective of a reasonable person in the complainant's protected class would still apply, a complainant's subjective responses to the harassing conduct would also be considered in evaluating the totality of the circumstances.³² Knowledge of harassment, even if not directly witnessed, may be relevant.³³ It is not necessary to prove the loss of a job benefit, physical contact or that the conduct was sexual in nature.³⁴

Expansion of Statutes of Limitations

As recommended by the DCR Report, the Proposed Legislation includes an expansion of the statutes of limitations to file a complaint of harassment with the DCR from six months to one year, and the period to file a civil complaint from two years to three years after the incident occurred.³⁵

Affirmative Defenses

The Proposed Legislation and the DCR Report seek to clarify the *Aguas/Faragher-Ellerth* affirmative defenses available to employers.³⁶ Under *Aguas*, employers can argue that they exercised reasonable care based on factors involving use of policies, training and arguing that employees unreasonably failed to avail themselves of complaint procedures.³⁷ The DCR Report highlighted a concern about how the proposed new policy and training protocols would interact with the *Aguas* defense. Specifically, if legislative amendments impose mandatory policies and training, every employer that implements and follows the protocols will be able to assert the *Aguas* affirmative defense, effectively eliminating liability for workplace sexual harassment.³⁸ To address that concern, the DCR Report highlighted its view that complying

with the recommended requirements will not constitute a defense to liability.³⁹ Moreover, the Proposed Legislation expressly states that an employer's compliance with the policy and training requirements will not, in and of itself, protect the employer from liability.⁴⁰

Best Practices for Investigations

The DCR Report and Proposed Legislation both specify the need for "prompt, thorough and impartial investigations" into complaints of harassment, discrimination, and retaliation.⁴¹ The DCR Report articulated four "Best Practices" for conducting investigations.

First, employers should "allocate sufficient resources and authority to those responsible for investigating complaints" and "ensure that those conducting investigations are impartial, objective, and well-trained."⁴² It was highlighted by the DCR that this may include employers engaging third parties trained in conducting "impartial, independent investigations."⁴³

Second, policies should set forth the stages and procedures for conducting the investigation.⁴⁴ For example, an employer should have clear protocols for what triggers an investigation; how an investigation will be conducted, including policies on witness interviews; and how an investigation will be concluded, including the issuance of a final report and retention policies on documents, notes and evidence, as well as, protocols for communicating the results to the impacted parties and appropriate post-investigation monitoring mechanisms.⁴⁵

Third, employers should "consistently enforce prohibitions on retaliation throughout the investigations process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation."⁴⁶ Employers should ensure that the parties trust the system and are treated with respect and compassion.

Fourth, employers should empower their investigators to "reach meaningful conclusions" and then follow up those conclusions with corrective action.⁴⁷ Guidance should be provided to those conducting investigations on how to appropriately assess credibility, weigh evidence, make finding and reach a conclusion.⁴⁸

The DCR also cited the appropriate investigation burden of proof as "more likely than not" (a preponderance of the evidence standard). Specifically, if the investigator finds that the conduct is "more likely than not" to have occurred, employers should "impose appropriate

consequences, up to and including termination” of the accused wrongdoer.⁴⁹

Significant and Groundbreaking Impact

While the Proposed Legislation has not yet been approved, it is an aggressive approach against a problem that has long existed in the workplace without a sufficient remedy so far. If these amendments to the NJLAD are approved, it will place New Jersey among the forefront of states that have taken a strong stand against harassment and discrimination in the workplace. While some states have already passed similar sexual harassment laws, New Jersey’s law would be far reaching due to the broad coverage of the training and policy requirements to virtually all employers and as to all NJLAD protected biased-based harassment, as well as broad employer reporting requirements on complaints of unlawful workplace discrimination and harassment. These amendments to the NJLAD would position New Jersey on the cutting edge of workplace protections to prevent harassment, discrimination, and retaliation. ■

Kirsten Scheurer Branigan and Carole Lynn Nowicki are partners at KSBranigan Law, P.C., a woman-owned law firm, in Montclair. The firm concentrates in Workplace Investigations, Alternative Dispute Resolution, and Employment Compliance, Audits, & Training. The attorneys regularly serve as independent investigators and provide training on Conducting Effective Employment Investigations as well as Harassment, Discrimination, and Retaliation Prevention Training for employees and supervisors. Branigan serves on the Investigation, Employment, and Mediation Panels with the American Arbitration Association. Nowicki serves as an Arbitrator on the Employment, Commercial, and Consumer Panels with the AAA.

A version of this article was first published in the March 12, 2020, issue of the New Jersey Law Journal. It is republished here with permission. © 2020 ALM Media Properties, LLC. All rights reserved.

Endnotes

1. See New Jersey Division on Civil Rights, Report on Preventing and Eliminating Sexual Harassment in New Jersey – Findings and Recommendations from Three Public Hearings (DCR Report) (February 2020), available at nj.gov/oag/dcr/pdfs/DCR-SH-Report_Feb2020.pdf, at 2-3.
2. *Id.* at 23-25.
3. N.J.S.A. 10:5-1, *et seq.*; N.J.S.A. 10:5-12.
4. See Office of Governor Phil Murphy, Proposals to Strengthen New Jersey’s Anti-Harassment Laws (Proposed Legislation) (February 2020), available at d31hzhk6di2h5.cloudfront.net/20200218/dd/87/37/a1/9bf5f53bfaf497bccce6039/Legislative_Proposal.pdf.
5. *Id.* at §§ 2b3, 6e-f, and 7a.
6. DCR Report, *supra* n.1, at 31-35.
7. *Id.* at 26-27; Proposed Legislation, *supra* n.4, at §§ 3, 4 and 5.
8. Proposed Legislation, *supra* n.4, at § 3b.
9. *Id.* at §§ 3c(1)-(4).
10. *Id.*
11. *Id.* at §§ 3b(1)-(3).
12. *Id.* at §§ 3b(4)-(5).
13. *Id.* at §§ 3b(6)-(8).
14. *Id.* at §§ 3b(9)-(10).
15. *Id.* at § 3b(1).
16. *Id.* at § 3j.
17. *Id.* at § 3h.
18. *Id.* at § 3e.

19. *Id.* at §§ 3f and 3h(2).
20. DCR Report, *supra* n.1, at 32.
21. Proposed Legislation, *supra* n.4, at §4k.
22. *Id.* at §§4i-k.
23. *Id.* at §§ 4i and 4f(2).
24. *Id.* at §§ 4g-h.
25. *Id.* at § 4i.
26. *Id.* at § 4b.
27. *Id.* at § 4b.
28. *Id.* at § 4c.
29. *Id.* at § 5b.
30. *Id.* at § 4d.
31. *Id.* at § 2b(1)(i); DCR Report, *supra* n.1, at 28.
32. Proposed Legislation, *supra* n.4, at § 2b(1)(ii).
33. *Id.*
34. *Id.* at § 2b(1)(iii-iv).
35. *Id.* at § 11.
36. DCR Report, *supra* n.1, at 26., *Aguas v. State*, 220 N.J. 494, 499 (2015); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
37. *Aguas*, 220 N.J. at 513 (quoting *Gaines v. Bellino*, 173 N.J. 301, 313 (2002)).
38. DCR Report, *supra* n.1, at 26.
39. *Id.* at 26-27.
40. Proposed Legislation, *supra* n.4, at §§ 3k and 4m.
41. DCR Report, *supra* n.1, at 34; Proposed Legislation, *supra* n.4, at § 3b(10).
42. DCR Report, *supra* n.1, at 34.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 35.
49. *Id.*