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New York State Imposes New Legal Requirements for Workplace Sexual Harassment Prevention

The Bottom Line

- *New York State's budget legislation, expected to be signed into law shortly, contains several measures related to workplace sexual harassment that will impact nearly every employer in New York.*
- *To prepare for these changes, New York companies are advised to consult with counsel to review and evaluate:*

    1. *whether anti-harassment policies and training programs need to be implemented and/or updated;*
    2. *practices related to the use of nondisclosure agreements in settlement agreements involving sexual harassment claims;*
    3. *provisions of employee arbitration agreements and/or arbitration clauses in employment contracts; and*
    4. *the engagement of independent contractors and other non-employees as part of the company's workforce.*

On March 30, 2018, New York State's legislative leaders reached an agreement with Governor Cuomo over a $168 million budget deal for the 2018-19 fiscal year. Buried in the text of the budget agreement were several provisions that will dramatically impact the law governing workplace sexual harassment. The changes, many of which resemble measures introduced in a number of states to respond to mounting public pressure in the wake of the #MeToo movement, will affect virtually all New York employers. Employers should familiarize themselves with the legislation, and be mindful that some provisions will take effect immediately upon its signing.

Mandatory Sexual Harassment Prevention Policy and Training Program

The legislation requires the New York State Department of Labor (DOL), in consultation with the Division of Human Rights (DHR), to create and publish a model sexual harassment policy. The policy must, at a minimum:

1. prohibit sexual harassment and provide examples of conduct that would constitute unlawful sexual harassment;
2. include information concerning the federal and state statutory provisions concerning sexual harassment, the remedies available to harassment victims and a statement that there may be applicable local laws;

3. include a standard complaint form;
4. include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
5. inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
6. clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
7. clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The bill additionally mandates that the DOL and DHR produce a model sexual harassment prevention training program. The training program must be interactive and contain:

1. an explanation of sexual harassment;
2. examples of conduct that would constitute unlawful harassment;
3. information on state and federal laws concerning sexual harassment and remedies available to victims; and
4. information on employees' rights and all available forums for adjudicating complaints administratively and judicially.

Once the DOL publishes a model policy and training program, the bill requires employers to either adopt the state's models or establish their own policies and training programs that meet or exceed the minimum standards set by the DOL within 180 days after the bill becomes law. Employers must distribute their new policy in writing to all employees, and utilize their new training program to provide training to all employees on at least an annual basis.

Employers should be on the lookout in the coming months for the DOL's model policy and training program. Once published, employers must ensure that their existing policies and training are in compliance with the new requirements. Employers that do not currently have written anti-harassment policies or provide training will need to implement both as part of their HR compliance program.

Prohibition on Nondisclosure Agreements for Sexual Harassment Claims

One of the most potentially impactful aspects of the bill is its restriction on the inclusion of nondisclosure clauses in any settlement or other agreement regarding sexual harassment "unless the condition of confidentiality is the complainant's preference." Specifically, the bill prohibits any contractual provision "that would prevent the disclosure of the underlying facts and circumstances to the claim or action." To ensure that the complainant prefers to include a nondisclosure clause, similar to the federal Older Workers Benefit Protection Act's consideration and revocation periods for settlement of age discrimination claims, the bill requires that the complainant be provided 21 days to consider the clause before signing the agreement, and 7 days after signing to revoke it. Any agreement containing a nondisclosure clause for a harassment claim will not become enforceable until the revocation period expires. The nondisclosure restrictions take effect 90 days after the budget is signed into law.

This restriction, in addition to recent changes to federal tax law prohibiting the deduction of any payments involving a settlement related to sexual harassment or abuse where the settlement agreement contains a nondisclosure provision, puts further pressure on employers' reliance on these provisions to keep the terms of settlements confidential. Employers should review and consider revising their standard settlement agreements to ensure they comply with the new law.

Prohibition on Mandatory Arbitration Clauses for Sexual Harassment Claims

The bill also contains a provision preventing employers from enforcing mandatory arbitration clauses to resolve sexual harassment claims in employment contracts. Any mandatory arbitration clause in a contract entered into after the provision's effective date (90 days after the bill becomes law) will be null and void with respect to sexual harassment claims. One major exception to this prohibition is where a collective bargaining agreement provides for mandatory arbitration of sexual harassment claims.

The legislation applies only on a going forward basis, and does not appear to impact contracts signed before its effective date. Moreover, the bill's inclusion of the proviso "except where inconsistent with federal law" raises questions of how much it will actually impact New York employers. The Federal Arbitration Act (FAA) requires enforcement of arbitration agreements involving interstate commerce, which in today's economy typically includes employment agreements. Even without the proviso, the FAA would likely preempt the bill's prohibition on arbitration clauses in many cases. However, mandatory arbitration will be prohibited where the parties have specifically contracted for New York State's arbitration law to apply, rather than the FAA.

While the state/federal conflict is being resolved in the courts, employers should consult with counsel regarding the impact the law may have on their employment agreements, and consider whether to revise their agreements going forward.

Extension of Protections to Non-Employees

Another provision with potentially major implications for many New York employers is the bill's extension of employers' liability for sexual harassment to non-employees. The bill provides that an employer can be held liable for sexual harassment of independent contractors, subcontractors, vendors, consultants, "or any other person providing services pursuant to a contract in the workplace" or the employees of any such person. Liability may apply when the employer, its agents or its supervisors knew or should have known that a non-employee was subjected to sexual harassment in the employer's workplace and failed to take immediate and appropriate corrective action.

This provision of the bill will become effective immediately upon signing by the Governor. Employers utilizing contractors, vendors or consultants should begin to review and consider revising their policies and training to account for the new law's broader scope. While New York City's Human Rights Law generally applies to many independent contractors, non-employee liability is likely a new concept for many employers outside of New York City.

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