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NYS and NYC have Passed New Anti-Harassment Laws Requiring Employers to Make Significant Changes to their Policies and to Implement Training

By: Kimberly Klein

On April 12, 2018, Governor Cuomo approved the New York State budget which included several significant new laws to combat sexual harassment in the workplace. One day before, the New York City Council enacted legislation titled, "Stop Sexual Harassment in NYC Act," also designed to enact tougher workplace standards. The laws affect all New York employers regardless of size.

The New York State laws includes the following provisions:

- ◊ Preclude mandatory arbitration agreements involving sexual harassment claims;
- ◊ Prohibit confidential settlement agreements involving sexual harassment claims unless certain conditions precedent are met;
- ◊ Require employers to adopt a sexual harassment policy compliant with a model policy to be developed by the State;
- ◊ Require the implementation of annual, interactive sexual harassment prevention training compliant with NYS guidelines; and
- ◊ Provide for the protection of certain non-employees in the workplace from sexual harassment.

Like the State legislation, the New York City legislation also requires employers to educate their workforce. The City law provides that employers must provide annual training and display posting requirements regarding sexual harassment. In addition, employees will have more time to file administrative claims, and the City sexual harassment law will now apply to all employers. Mayor De Blasio is expected to sign the Act into law.

New York State Laws

No Mandatory Arbitration (effective 90 days after enactment)

Employers may no longer require employees to sign agreements requiring employees to arbitrate sexual harassment claims. The law further provides that such clauses shall be null and void, except where inconsistent with federal law. Federal law does not except sexual harassment claims from arbitration agreements, creating an issue ripe for litigation whether state law will be partly or wholly preempted by federal arbitration law.

The New York State law does not preclude arbitration of all other claims arising out of the employee's employment.

Special Requirements for Confidential Settlements of Sexual Harassment Claims (effective 90 days after enactment)

To include confidentiality provisions in settlement or other agreements that involve the resolution of a claim for sexual harassment, employers must meet these requirements:

- ◊ The complaining party has twenty-one (21) days to consider the confidentiality provision;
- ◊ Following the twenty-one day (21) period, the complaining party provides in writing the party's agreement to confidentiality and such writing is signed by all parties; and
- ◊ The complaining party has seven (7) days to revoke the agreement, which does not become enforceable until after the 7-day period has expired.

Unlike the similar twenty-one day requirement under the Older Worker Benefits Protection Act, the law does not provide that the 21-day period may be waived. In addition, employers should keep in mind under the new federal tax laws, an employer may not take a tax deduction on a settlement payment or deduct attorneys' fees or litigation expenses related to the settlement of a sexual harassment claim if the settlement agreement contains a confidentiality or non-disclosure provision.

Mandatory Sexual Harassment Prevention Policy (effective 180 days after enactment)

While many employers have employee handbooks that contain anti-discrimination policies, not all employers have such policies and many smaller employers choose to rely on displaying federal, state and city postings to inform employees of their rights under the human rights laws. With the enactment of the law, all employers will be required to have such a policy that complies with the guidance to be promulgated by the Department of Labor in conjunction with the State Division of Human Rights.

The DOL and SDHR also are to develop a model sexual harassment prevention policy for employers to adopt that will:

- ◊ provide examples of prohibited conduct that constitutes unlawful sexual harassment;
- ◊ advise employees about federal, state and local statutory provisions and inform them about remedies available to victims of sexual harassment;
- ◊ include a standard complaint form;
- ◊ set forth the procedure for timely and confidential investigation of complaints;
- ◊ inform employees that they may adjudicate sexual harassment complaints in multiple forums;
- ◊ make clear that sexual harassment is a form of employee misconduct and that those who engage in sexual harassment or supervisory/managerial personnel who have knowledge of such conduct and fail to act will be disciplined; and
- ◊ advise that retaliation against individuals who complain of sexual harassment or testify or assist in any proceeding is unlawful.

The policy must be provided to all employees in writing, and we recommend every employee execute an **acknowledgement of receipt** of the prevention policy. While employers have 180 days to put such a policy in effect, the agencies have been tasked to immediately begin working on the guidance and model policy.

Mandatory Annual Training (effective 180 days after enactment)

All employers will be required to provide mandatory sexual harassment prevention training in the workplace. The training must be interactive and include:

- ◊ an explanation of sexual harassment;
- ◊ examples of conduct that constitute unlawful sexual harassment;
- ◊ information concerning federal and state sexual harassment statutes and remedies available to victims; and
- ◊ employees' rights of redress and the available administrative and judicial forums to adjudicate such claims.

In addition, the model training prevention program must specifically address supervisory conduct and responsibilities, as employers are vicariously liable for the acts of supervisors under State law.

Non-Employees Are Now a Protected Classification (effective upon enactment)

It is now an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees where the employer knew, or should have known, that the non-employee was subjected to sexual harassment in the workplace and failed to take immediate corrective action. "Non-employees" include "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace."

Courts or adjudicating bodies may consider the extent the employer has control over the harasser when determining unlawful behavior and/or liability.

Checklist for Employers:

As a result of the new laws, employers should:

- ♦ Adopt a Sexual Harassment Prevention Policy compliant with State and City Law.
- ♦ Revise Anti-Discrimination policies in Handbooks.
- ♦ Revise mandatory arbitration agreements to except sexual harassment claims.
- ♦ Revise severance and other agreements involving settlement of sexual harassment claims containing non-disclosure provisions.
- ♦ Comply with NYS and NYC sexual harassment training requirements and guidance.
- ♦ Display the required NYC sexual harassment postings in English and Spanish.
- ♦ Expand sexual harassment policies and protections to include non-employees.

New York City Laws

Required Posting (effective 120 days after enactment)

All New York City employers will be required to conspicuously display an anti-sexual harassment rights and responsibility

poster. The poster must be displayed in employee break rooms or other common areas employees gather and must be posted separately in English and Spanish. The New York City Human Rights Commission (the "Commission") will create the poster, which must set forth:

- ◊ an explanation that sexual harassment is a form of unlawful discrimination under City law;
- ◊ a statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- ◊ a description of sexual harassment with examples;
- ◊ the complaint process at the federal, State and City level and how to contact the respective agencies; and
- ◊ the prohibition against retaliation.

In addition, the Commission will develop an Information Sheet on sexual harassment containing the above information that employers must distribute to employees at the time of hire. The Information Sheet may be included in an employee handbook.

Annual Anti-Sexual Harassment Training (effective April 1, 2019)

All New York City private employers with 15 or more employees will be required to conduct annual anti-sexual harassment interactive training for all employees, including interns, supervisory and managerial personnel. The training must occur after 90 days of the initial hire for all full-time and part-time employees who work more than 80 hours in a calendar year.

The training may be conducted online, and the Commission has been tasked with developing an online training program that employers may utilize to comply with the law at no cost to the employer. The training must include the following:

- ◊ an explanation that sexual harassment is a form of unlawful discrimination under City, State and federal law;
- ◊ a description of sexual harassment with examples;
- ◊ any internal complaint process available to employees to address sexual harassment claims;
- ◊ the complaint process at the federal, State and City level and how to contact the respective agencies;
- ◊ the prohibition against retaliation;
- ◊ information concerning bystander intervention; and
- ◊ the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation and measures that such employees may take to address sexual harassment complaints.

Employers must keep records of all training for three years, including a signed employee acknowledgement, which can be electronic. If employers utilize the Commission's training program, they must supplement the program by separately informing employees of internal complaint procedures in place. Employees using the Commission's program will be provided with electronic certification that they completed the training.

All NYC Employers Affected (effective immediately upon enactment)

Consistent with NYS law, all New York City employers of any size will now be subject to "gender based" harassment claims. Prior to the amendments, the City's discrimination laws applied to employers with four or more employees. Independent contractors that carry out work in furtherance of an employer's business are considered employees.

Other than for sexual harassment claims, the definition of "employer" remains unchanged.

Extended Statute of Limitations (effective immediately upon enactment)

Employees will now have three years to file gender-based harassment claims with the Commission. Prior to the Act, employees had one year to file a claim with the Commission or three years to commence a judicial proceeding.

If you have any questions concerning the implementation of the new laws, please contact Kimberly Klein at 212-554-7853 or kklein@mosessinger.com.

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