



New York State Enacts Sweeping Legislation to Combat Workplace Sexual Harassment

On April 12, 2018, New York Governor Andrew Cuomo signed into law as part of the New York State budget several bills designed to combat workplace sexual harassment. The new laws were part of the Governor's Women's Agenda and a response to the issues and concerns raised by the #MeToo movement. Among other things, the new laws will:

- Require employers to adopt and distribute a written policy prohibiting sexual harassment and implement annual sexual harassment prevention training for all employees;
- Extend the protections of the New York Human Rights Law against sexual harassment to "nonemployee" service providers, including contractors, subcontractors, vendors, consultants and others providing services pursuant to a contract;
- Bar mandatory arbitration clauses for workplace sexual harassment claims;
- Prohibit nondisclosure clauses in any settlement or agreement relating to a claim of sexual harassment, unless it is the preference of the complainant to include such a clause;
- Require that state contractors bidding on contracts requiring competitive bidding certify that they have in place a sexual harassment policy and provide annual employee training; and
- Require public employees to reimburse their public employer for the employee's proportionate amount of any judgment the public employer is required to pay that is related to a claim of sexual harassment for which the employee is adjudged liable.

Mandatory Sexual Harassment Policy and Training

As the result of an amendment to the New York Labor Law, effective October 9, 2018, all employers in New York State will be required to adopt and distribute a sexual harassment prevention policy and implement annual sexual harassment prevention training for all employees. The law also directs the New York State Department of Labor ("DOL") and New York State Division of Human Rights ("SDHR") to develop a model sexual harassment prevention policy and a model sexual harassment prevention training program for use by employers. Employers will have to adopt and use the model policy and training program, or develop and use their own, which must equal or exceed the minimum standards established by these agencies.

The model policy will:

- Prohibit sexual harassment consistent with the guidance issued by the DOL and provide examples of conduct that would constitute unlawful sexual harassment;
- Include information regarding the federal and state statutory provisions concerning sexual harassment and the remedies available to victims of sexual harassment, as well as a statement that there may be applicable local laws;
- Include a standard complaint form and a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;



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- 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
- State that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

Liability for Sexual Harassment of Nonemployees

Effective immediately, the New York Human Rights Law has been amended to extend employer liability for sexual harassment to contractors, subcontractors, vendors, consultants or other persons providing services in the workplace pursuant to a contract. An employer may now be held liable if the employer or its agents or supervisors knew, or should have known, that a nonemployee was being subjected to sexual harassment in the employer's workplace and failed to take immediate and appropriate corrective action. The extent of the employer's control over the conduct of the harasser will be a factor in determining liability.

Mandatory Arbitration of Sexual Harassment Claims Prohibited

Effective July 11, 2018, the New York Civil Practice Law and Rules ("CPLR") is amended to prohibit the inclusion in any written contract of any clause that requires final and binding arbitration of any claim based on sexual harassment. Arbitration clauses in collective bargaining agreements are exempted from this prohibition, and the legislation expressly states that nothing in it prohibits the inclusion of any other mandatory arbitration provision that the parties agree upon. However, the effect of this provision may be limited, as an arbitration clause subject to the Federal Arbitration Act included in a contract may possibly

still be enforceable as a matter of federal preemption of state law.

Nondisclosure Agreements Restricted

As the result of amendments to the General Obligations Law and CPLR, effective July 11, 2018, nondisclosure clauses will be prohibited in any agreement settling or resolving any claim or court action, "the foundation of which involves sexual harassment," unless it is the "complainant's preference" to include such a clause in the settlement. Notice of the clause must be given to all parties, and the complainant must receive 21 days to consider whether to accept or reject the clause. If the complainant accepts the nondisclosure clause, he or she will then have seven (7) days to change his or her mind and revoke it. The nondisclosure clause will not become effective or enforceable until the revocation period has expired. (Employers should also be aware that under a provision of the recently enacted federal Tax Cuts and Jobs Act, any amounts paid to settle a sexual harassment claim, including attorneys' fees, are no longer deductible from federal taxes if the claim is subject to a confidentiality clause.)

State Contractor Certification

Effective January 1, 2019, changes to the State Finance Law will require that every bid made to New York State or any public department or agency where competitive bidding is required, contain a certification, signed under the penalty of perjury, stating that the bidder has implemented a written sexual harassment policy and provides annual sexual harassment prevention training to all of its employees. Bids lacking such certification will not be considered, unless the bidder states why it cannot make the required certification and provides a signed statement with the bid setting forth in detail the reason. Where competitive bidding is not required, the State, public department or agency may, at its discretion, impose the same certification requirement.



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Reimbursement by Public Employees

Effective immediately, the Public Officers Law requires any public employee adjudged personally liable for sexual harassment to reimburse his or her public employer for the employee's proportionate share of any judgment that the public employer is required to pay related to the employee's conduct. If the public employee does not reimburse his or her public employer within 90 days of the employer paying the judgment, the public employer is required to obtain a judgment against the employee and garnish his or her wages. For purposes of this statute, "employee" includes any person holding a position by election, appointment or employment, and any commissioner, member of a public board or commission, trustee, director or officer, whether or not compensated.

New York City Proposed Legislation

In addition to the above changes enacted into law at the state level, on April 11, 2018, the New York City Council passed 11 bills entitled the *Stop Sexual Harassment in NYC Act* addressing sexual harassment, which Mayor Bill de Blasio is expected to sign shortly. Several of the bills are directed at private employers in New York City and, if enacted into law, would:

- Extend the prohibition against gender-based harassment under the New York City Human Rights Law ("NYCHRL") to all employers, rather than only employers with four (4) or more employees;

- Require that as of April 1, 2019, all private employers with at least 15 employees provide annual sexual harassment training that meets codified minimum standards. New employees would have to receive training within 90 days of hire, and employers would have to obtain signed employee acknowledgements and keep training records for at least three (3) years. The New York City Commission on Human Rights would also be directed to create a free online training module for employer use;
- Require that 120 days after becoming law employers display an "anti-sexual harassment rights and responsibilities" poster in English and Spanish in a conspicuous place. Employers would also have to inform new employees of their rights and responsibilities under the law by providing them with either a separate information sheet or a handbook containing the information upon hire; and
- Extend, immediately upon becoming law, the statute of limitations for filing gender-based harassment claims under the NYCHRL from one (1) to three (3) years.

Additional Assistance

Should you have any questions regarding New York State's legislation to combat workplace sexual harassment, please contact any of the attorneys on our Labor & Employment Practice Team. ■



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