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NYS and NYC Crack Down on Sexual Harassment, Imposing New Requirements on Employers

New York State and New York City both recently enacted legislation imposing a raft of new requirements on employers relating to sexual harassment. Here are the key provisions of each law and the dates they become effective.

New York State

Non-employees. Effective immediately, it is an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in its workplace. An employer may be held liable to a contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace if the employer or its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace and the employer failed to take immediate and appropriate corrective action. In any such cases, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of the harasser shall be considered.

Non-disclosure Agreements. Effective July 11, 2018, employers may not include in any settlement agreement or other resolution of a claim involving sexual harassment any term that would prevent the disclosure of the underlying facts and circumstances, unless the confidentiality provision is the complainant's preference. The complainant must be given 21 days to consider any such term before a written agreement is signed and at least seven days following the execution of the agreement to revoke it. An agreement shall not become effective or enforceable until the revocation period expires. The 21-day consideration period and seven-day revocation period cannot be waived or shortened.

Arbitration Agreements. Effective July 11, 2018, except where inconsistent with federal law, no written contract may include a clause requiring the parties to submit to mandatory arbitration to resolve any allegation or claim of unlawful sexual harassment. The qualification "except where inconsistent with federal law" recognizes that the Federal Arbitration Act may preempt this provision of the New York statute, though we will not know that for certain until the provision is challenged in court.

Sexual Harassment Policy. Effective October 9, 2018, every New York employer must adopt a sexual harassment policy that does all of the following: prohibits sexual harassment; provides examples of conduct that would constitute unlawful sexual harassment; provides information concerning remedies available to victims of sexual harassment under federal and state statutes; includes a standard complaint form; includes a procedure for the timely and confidential investigation of complaints; informs employees of their rights of redress and available forums for adjudicating sexual harassment complaints; states that sexual harassment is a form of employee misconduct and that sanctions will be enforced against people who engage in sexual harassment and against supervisory and managerial employees who knowingly allow it to continue; and states that retaliation against people who complain of sexual harassment or who testify or assist in any proceeding is unlawful.

The New York Department of Labor and Division of Human Rights will jointly draft a model sexual harassment policy and post it on their websites. Employers may either adopt the model policy or establish their own policies that equal or exceed the minimum standards provided by the model policy. Employers must provide copies of their sexual harassment policies to all employees in writing.

Sexual Harassment Prevention Training. Effective October 9, 2018, employers are required to provide annual interactive sexual harassment prevention training to all employees, using either the model training program to be drafted by the Department of Labor and the Division of Human Rights or one that equals or exceeds the model's minimum standards. The model training program will include an explanation of sexual harassment; examples of conduct that would constitute unlawful sexual harassment; information concerning remedies available to victims of sexual harassment under federal and state statutes; information concerning employees' rights of redress and available forums for adjudicating sexual harassment complaints; and additional information concerning the responsibilities of supervisors.

New York City

NYC Human Rights Law. Effective immediately, the New York City Human Rights Law is expanded to prohibit gender-based harassment against any employee, regardless of the size of the employer (whereas the law had previously applied only to employers with four or more employees).

Statute of Limitations. Effective immediately, the statute of limitations for filing complaints of gender-based harassment with the New York City Commission on Human Rights is extended from one year to three years after the alleged harassing conduct occurred.

Poster and Information Sheet. Effective September 6, 2018, employers will be required to conspicuously display an anti-sexual harassment rights and responsibilities poster in employee breakrooms or other common places employees gather, and distribute to newly hired employees an information sheet on sexual harassment, both of which will be created by the New York City Human Rights Commission and made available on its website.

Training. Effective April 1, 2019, employers with 15 or more employees will be required to conduct annual interactive sexual harassment training for all employees. The training must address certain identified topics, including definitions and examples of sexual harassment; any internal complaint procedures available to employees to address sexual harassment claims; the process for filing complaints with applicable administrative agencies; the prohibition of retaliation; information on bystander intervention; and the responsibilities of supervisory and managerial employees in preventing sexual harassment and retaliation. The New York City Human Rights Commission will develop training materials that employers may use along with a discussion of the employers' own internal complaint procedures for sexual harassment claims. Newly hired employees are required to receive the training within 90 days of hire.

Although these statutes apply only to employers in New York State and New York City, employers in other jurisdictions could benefit from many of their provisions, such as those regarding sexual harassment policies and training. That is especially true as additional states contemplate similar measures aimed at preventing sexual harassment in the "Me Too" era. For example, while a bill addressing sexual harassment recently failed in the Connecticut House of Representatives due to expiration of the legislative session, the bill may be reintroduced in that state's next session. Among other provisions, the Connecticut bill would have required employers with three or more employees to provide sexual harassment training to all employees and to e-mail a sexual harassment policy to new employees, and it would have extended the time to file a charge of discrimination with the Commission on Human Rights and Opportunities from six months to three years.

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