

April 27, 2018

## **New York State and City Adopt Sexual Harassment Legislation**

Both the New York State (“NYS”) Legislature and the New York City (“NYC”) Council have adopted legislation addressing sexual harassment in the workplace (the NYC legislation is awaiting signature by Mayor de Blasio). This client advisory outlines the new requirements for employers located in NYS and NYC and the next steps for employers in light of these new laws.<sup>1</sup>

### **1. Mandatory Sexual Harassment Policy (NYS)**

Effective October 9, 2018, NYS employers must either adopt a model Sexual Harassment Prevention Policy created by the Department of Labor (“DOL”) and Division Of Human Rights (“Model Policy”), or draft a sexual harassment prevention policy that meets the minimum standards of the Model Policy. The Model Policy, as well as the anticipated Sexual Harassment Prevention Guidance Document (“Guidance”), will be posted on the DOL and Division websites.

Specifically, the policy must:

- prohibit sexual harassment and provide examples of conduct that would constitute unlawful sexual harassment;
- include information about the federal and state laws on sexual harassment and the remedies available to victims of sexual harassment, including a statement that there may be applicable local laws;
- include a standard complaint form;
- include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

<sup>1</sup> Note that this new set of legislation also imposes additional obligations on state and city contractors not detailed here.

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

## **2. Mandatory Sexual Harassment Training (NYS & NYC)**

Effective October 9, 2018, all NYS employers must provide annual, interactive sexual harassment prevention training to all employees. NYS intends to develop an interactive training model, but employers can also develop their own training to include, at a minimum:

- an explanation of sexual harassment consistent with guidance issued by the DOL;
- examples of conduct that would constitute unlawful sexual harassment;
- information about the federal and state statutory provisions concerning sexual harassment and the remedies available to victims of sexual harassment;
- information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- information addressing conduct by supervisors and any additional responsibilities that apply to supervisors.

New York City has also imposed interactive training requirements on employers with 15 or more employees (including interns), which will go into effect April 1, 2019. Training must occur within 90 days of initial hire for full-time and part-time employees who work more than 80 hours in a calendar year, and thereafter on an annual basis. Many of the requirements under the NYC law mirror those imposed under the state law, but NYC training must also include:

- an explanation of sexual harassment as a form of unlawful discrimination under local law (in addition to federal and state law), including examples;
- the complaint process available through the NYC Commission on Human Rights ("Commission"), the State Division of Human Rights, and the EEOC, and the contact information for these agencies;
- the employer's internal complaint process for complaints of sexual harassment;
- the prohibition of retaliation and examples of retaliatory conduct;
- information concerning bystander intervention, including an explanation of how to engage in 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 appropriately address sexual harassment complaints.

The Commission will also develop and provide an online interactive training module that can be used to satisfy NYC's training requirements, as well as other online resources regarding sexual harassment, retaliation, bystander intervention, and the Commission's complaint process. Employers, however, should note that even if they utilize the Commission's model training, they must also inform all employees of the employer's internal process for addressing sexual harassment claims. Unlike the state law, NYC clarifies that while in-person instruction is not required to be considered "interactive," the training must be participatory in that the trainee should be engaged in trainer-trainee interaction, use of audio-visual aids, or an online training or other similar program. The NYC law requires employers to keep a record of all trainings, including a signed employee acknowledgment, for at least three years. Such a record can be in electronic form, and must be made available to the Commission upon request.

### **3. Mandatory Arbitration Clauses to Resolve Sexual Harassment Claims Prohibited (NYS)**

Effective July 11, 2018, except where inconsistent with federal law or a collective bargaining agreement, employers can no longer require mandatory arbitration for any allegations or claims of sexual harassment in New York. Although including such a mandatory arbitration clause in a contract will be considered null and void, the inclusion of such a provision will not impair the enforceability of any other contractual provision.

### **4. Prohibition of Non-Disclosure Agreements When Resolving Sexual Harassment Claims (NYS)**

Effective July 11, 2018, NYS employers may no longer include Non-Disclosure Agreements when settling or resolving a sexual harassment claim, unless the condition of confidentiality is the complainant's preference. Any confidentiality provision should be provided to all parties and the complainant must have 21 days to consider the provision and determine if they prefer confidentiality. If, after the 21-day period, the complainant prefers confidentiality, such a preference must be memorialized in an agreement signed by all parties. The complainant then has at least seven days following the execution of such an agreement to revoke the agreement, and the agreement does not become effective or enforceable until such revocation period has expired.

### **5. Expanded Statutory Protections (NYS & NYC)**

Effective immediately, contractors, subcontractors, vendors, consultants, and other individuals providing contracted services are covered by the anti-harassment provisions of the State Human Rights Law. An employer may be liable to these non-employees when the employer, its agents or supervisors knew or should have known that the non-employee was subjected to sexual harassment in the employer's workplace, and the employer failed to take prompt and appropriate corrective action.

The New York City Human Rights Law protections for victims of sexual harassment will also be expanded, pending approval of the legislation from Mayor de

Blasio. Specifically, the NYCHRL will mirror state law by making gender-based harassment an unlawful discriminatory practice for all NYC employers, not just those with four or more employees. The statute of limitations for filing claims of gender-based harassment with the NYC Commission will also be increased from one year to three years. Finally, the preamble to the NYCHRL will be amended to clarify that sexual and gender-based harassment is unlawful.

## **6. Requirement for an Anti-Sexual Harassment Rights and Responsibilities Poster (NYC)**

Effective September 6, 2018, each NYC employer will be required to conspicuously display an English and Spanish anti-sexual harassment rights and responsibilities poster designed by the Commission in employee breakrooms or other common areas where employees gather.

Employers must also distribute an information sheet on sexual harassment—developed by the Commission—to individual employees at the time of hire. This sheet may also be included in the employee handbook.

### **Next Steps**

Although further guidance is expected at both the State and Local levels that may impact implementation, employers should begin the process of reviewing their written handbook policies and employee training materials to incorporate some of the requirements described in this alert. Employers should also coordinate with counsel to review their arbitration and settlement agreements so that these agreements comply with the revised laws.

If you have any questions about the above legislation, please contact Tonianne Florentino, Tina Grimshaw, Milan Chatterjee, or any other attorney at the Firm at (212) 758-7600.

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