SEXUAL HARASSMENT IN THE WORKPLACE: NEW YORK LEGISLATION IN THE WAKE OF THE #METOO AND #TIMESUP MOVEMENTS

In the United States, the concept of implementing policies and procedures to prevent sexual harassment in the workplace is not new. However, the #MeToo and #TimesUp movements, which were sparked by disturbing revelations about top executives across a range of industries, have mobilized the public to demand more protections for employees in the workplace. Indeed, lawmakers across the country have reacted to these demands, in part, by enacting legislation aimed at preserving employees' rights to a workplace free from sexual harassment and discrimination.

On April 12, 2018, New York Governor Andrew Cuomo signed into law the 2019 New York Budget, creating new obligations for New York employers (the "Law"). The following is a summary of what the Law does with respect to sexual harassment in the workplace and how it will affect employers.

Prohibits Mandatory Arbitration Agreements for Sexual Harassment Claims

The Law amends the New York Civil Practice Law and Rules ("CPLR") to prohibit, except where inconsistent with federal law, any provision in an employment-related contract which requires a party to submit claims of sexual harassment to mandatory and binding arbitration. For employment-related contracts entered into as of July 11, 2018, such mandatory arbitration clauses will be rendered null and void. The exception to this prohibition will be arbitration clauses included in collective bargaining agreements, which will still be enforceable.

Prohibits Confidential Settlement Agreements for Sexual Harassment Complaint without the Complainant's Consent

The Law further amends the CPLR and New York General Obligations Law to prohibit employers from including confidentiality provisions in any settlement agreement for sexual harassment unless the confidentiality provision is the complainant's preference. The Law requires that the confidentiality clause must be provided to all parties. The complainant must be given (i) 21 days to consider the provision and (ii) 7 days in which to revoke his or her acceptance of the provision. This prohibition will be effective July 11, 2018.

Extends Sexual Harassment Protection to "Non-Employees"

Effective immediately, an employer can be held liable under the New York State Human Rights Law for permitting the sexual harassment of non-employees (including contractors, vendors, consultants, service providers, etc.) in the employer's workplace.

Requires Employers to Implement Sexual Harassment Policies and Training Program in Accordance with State Standards

The Law amends the New York Labor Law to require employers to have a written sexual harassment policy and to provide employees with annual training on this topic. The New York Department of Labor and the New York State Division of Human Rights will work together to

create a model sexual harassment prevention policy (the "Model Policy") and a model sexual harassment prevention training program (the "Model Training Program") that employers can use.

The Model Policy must include the following elements:

- A statement prohibiting sexual harassment including examples of conduct that would constitute unlawful sexual harassment;
- Information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims, and with a statement that there may be additional applicable laws;
- A standard complaint form;
- A procedure for timely and confidential investigation of complaints that ensures due process for all complaints;
- A statement informing employees of their rights of redress and available forums for adjudicating sexual harassment complaints administratively and judicially;
- A clear statement that sexual harassment is a form of employee misconduct, and that sanctions will be enforced against individuals engaging in sexual harassment and against managers and supervisory personnel who knowingly allow such behavior to continue; and
- A clear statement that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding is unlawful.

The Model Training Program must be interactive and include:

- An explanation of sexual harassment and examples of conduct that would constitute unlawful sexual harassment;
- Information about the federal and state statutory provisions concerning sexual harassment and remedies available to victims;
- Information addressing supervisor conduct and additional responsibilities for such supervisors; and
- Information concerning employees' right of redress and all available forums for adjudicating complaints.

New York employers must either (1) adopt the Model Policy and Model Training Program or (2) develop their own policies and training programs that equal or exceed the minimum standards set forth by the state agencies. Employers will have until October 9, 2018 to distribute their written harassment policies to their employees, and to implement and present their training program.

Next Steps for New York Employers

Employers should take several measures to ensure that they comply with the obligations and prohibitions created by the Law. First, employers should review existing sexual harassment prevention policies (including those set forth in employee handbooks) and training programs and consult an attorney to determine what revisions should be made. Employers should also review their standard settlement and arbitration agreements and revise them in accordance with the limitations set forth in the Law.

For assistance in crafting a compliant sexual harassment prevention policy or training program, or revising your standard employment-related agreements, please contact our office.

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