New York Response to #MeToo: New Laws Target Sexual Harassment
Sweeping new legislation in New York aims to prevent and shine light on sexual harassment.

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TAKEAWAYS

😊 New York State employers will soon be prohibited from mandating arbitration of sexual harassment claims. They must also obtain informed consent to confidentiality provisions for sexual harassment allegations and must conduct annual sexual harassment training.

😊 Effective immediately, workplace sexual harassment protections extend to any independent contractors and other non-employees performing services at an employer’s New York State worksites.

😊 New York City’s laws will also soon expand the limitations period and the reach of gender-based discrimination claims and will require interactive sexual harassment training for all employees within 90 days of hire.

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CHANGES TO NEW YORK STATE LAW

Last month, Gov. Andrew Cuomo signed into law the 2019 New York State budget. The budget bill included a series of laws aiming to expand the scope of worker protections against sexual harassment, to limit employers’ ability to keep claims of sexual harassment confidential, and to increase employer and employee education on sexual harassment.

Extending the Protections of New York State Human Rights Law to Non-Employees (effective as of April 12, 2018)
The protections under New York State law against sexual harassment traditionally applied only to employees. Those protections are now extended to contractors, subcontractors, vendors, consultants, or other individuals providing services in an employer’s New York State workplaces.

An employer may now be held liable for sexual harassment of these non-employee workers when: (1) the employer, or its agents or supervisors, knew or should have known that such a non-employee was subjected to sexual harassment in the employer’s workplace, and (2) the employer failed to take immediate and appropriate corrective action. This law does not extend protections to any contractors, subcontractors, vendors, or consultants that perform services for the employer off-site. Employers with such non-employee workers providing services at their worksites in New York should immediately revise their sexual harassment policies and procedures to reflect this broader scope of coverage and include those non-employees in anti-harassment training programs.

Limitations on Confidentiality and Arbitration Clauses in Agreements Relating to Sexual Harassment (effective July 11, 2018)

Beginning July 11, 2018, employers must be mindful of two new contract drafting restrictions regarding sexual harassment, intended to make it more difficult for employers to shield sexual harassment allegations from becoming public.

Limitations on Confidentiality Provisions

The first such law, amending New York’s Civil Practice Law and Rules (CPLR, the State’s code of civil procedure) and General Obligations Law (statutory law on contract drafting), provides that any settlement, agreement or other resolution of a claim “the factual foundation for which involves sexual harassment” cannot include a confidentiality or non-disclosure provision, unless the complainant wants to include the provision. Under this new law, any provision that prevents disclosure of the underlying facts of the complainant’s sexual harassment claim would be void and unenforceable unless agreed to by the complainant. Similar to the waiver requirements under the federal Age Discrimination in Employment Act (ADEA), the complainant must be provided 21 days to consider whether to accept or refuse a nondisclosure provision. The complainant then has 7 days to revoke a signed agreement that includes a nondisclosure provision. Unlike under the ADEA, however, the 21-day consideration period is not waivable by the complainant. The practical effect of this provision may well be to now extend the 21-day/7-day waiting period requirements to all separation agreements with New York State employees, even for employees under age 40 years of age, at least to the extent those agreements include confidentiality provisions. That the consideration and revocation periods are both non-waivable also means that any severance payments will be delayed at least for 30 days after the separation agreement is offered to an employee.

Although the law provides clarity on the procedure for negotiating confidentiality provisions in settlement agreements, it fails to answer several key questions:
Do the restrictions on confidentiality provisions apply only to New York employees? Or do they apply to every settlement agreement regarding sexual harassment entered into in a case pending in a New York court, pursuant to the CPLR amendment, even if the employee did not work in New York?

Do the restrictions apply to every settlement agreement governed by New York law, pursuant to the amendment to the General Obligations Law, even if the employee did not work in New York?

Can multistate employers avoid the need to comply with the law by drafting an agreement so that it is governed by the law of the jurisdiction where the employer is headquartered rather than the law of New York, where the employee worked?

Do the restrictions apply only to an agreement specifically resolving an asserted claim of sexual harassment, or does the law apply to all general releases in separation and settlement agreements?

If an employee does not consent to confidentiality of sexual harassment claims, can an employer require the non-disclosure of allegations other than sexual harassment in an agreement that waives all claims against the employer?

Do the restrictions apply to provisions mandating non-disclosure of the consideration provided in the settlement and/or other terms of the agreement—or even of the existence of the agreement?

What is the impact of an employee revoking consent to the non-disclosure provision? Is only that provision revoked, or is the entire agreement revoked?

If an employer enters into an agreement in violation of the law (i.e., the employer includes a confidentiality provision in the agreement and the employee is not provided the requisite time period to consider, accept and revoke the agreement), is the entire agreement void?

As readers may recall, the Federal Tax Cuts and Jobs Act of 2017 also seeks to limit the use of non-disclosure clauses with respect to sexual harassment claims by providing that, where a non-disclosure provision is included in a settlement of a sexual harassment claim, the employer may not treat any settlement payment as tax deductible, nor may either party deduct any attorneys’ fees or litigation expenses related to such a settlement. This ability to deduct settlement-related payments may well be a more significant determinant of whether employers choose to secure non-disclosure agreements than the burden of compliance with the new state requirement.

**Limitations on Arbitration Provisions**

The second New York State law, which will become part of Article 75 of the CPLR, will void arbitration provisions included in any employment-related contract agreement entered into after July 11, 2018, that mandates binding arbitration of any claim of sexual harassment, except with respect to collectively bargained agreements. Noncompliant arbitration provisions will void the entire arbitration provision.

The legal community has already called into doubt the enforceability of this anti-arbitration law due to its potential preemption by the Federal Arbitration Act, which restricts states from adopting laws that disfavor the enforcement of arbitration provisions involving interstate commerce. It is recommended, however, that until
this issue has been decisively determined by a court, employers who wish to avoid any litigation over the enforceability of their arbitration agreements include carve-outs for sexual harassment claims in their arbitration agreements.

**Mandatory Written Anti-Harassment Policies and Training (effective October 9, 2018)**

Beginning October 9, 2018, New York State will mandate annual sexual harassment training for all employees in the state. The New York State Department of Labor and Division of Human Rights will develop a model written sexual harassment prevention policy and a model sexual harassment prevention training program. Once ready, the model written policy will be available on the Department of Labor’s and Division of Human Rights’ websites. The model written anti-sexual harassment policy will include federal and state statutory provisions concerning sexual harassment, a standard complaint form, and a procedure for timely and confidential investigation of complaints. The model policy will also (i) inform employees of their rights of redress and all available means of adjudicating sexual harassment complaints administratively and judicially, (ii) explain that sexual harassment is employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment and against supervisors who knowingly allow sexual harassment to continue, and (iii) state that retaliation is unlawful against employees who complain of sexual harassment or who testify or assist in any proceeding relating to sexual harassment claims. The model anti-sexual harassment training program will provide examples of conduct that constitutes unlawful sexual harassment, information about federal and state statutory provisions concerning sexual harassment, and information about employees’ rights of redress and all available means of adjudicating sexual harassment complaints.

**Mandatory Disclosure of Compliance with Anti-Harassment Laws in State Government Contract Bids (effective January 1, 2019)**

Beginning January 1, 2019, any employer that submits a bid for a contract with the State of New York or any of its public departments or agencies must submit a statement, under penalty of perjury, that it “has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees” that meets the minimum requirements of the new state-mandated sexual harassment policy and training law. Significantly, the State of New York will not consider any bids that do not include this affirmation—even from out-of-state employers. As a result, employers based outside of New York who seek government contracts with New York State will have to provide the newly required sexual harassment policy and annual training to not only to their New York employees, but to “all of [their] employees.”

**CHANGES TO NEW YORK CITY LAW**

New York City has also passed its own sweeping sexual harassment legislation. On May 9, 2018, Mayor Bill de Blasio signed a package of 11 bills relating to sexual harassment, many of which overlap with statewide law. Employers with employees in New York City now have the following additional requirements, in addition
to those mandated by the State:

**Extended Statute of Limitations for Gender-Based Harassment Claims (effective as of May 9, 2018)**

The statute of limitations for claims of gender-based harassment under the New York City Human Rights Law has been increased from one year to three years from the date of the alleged harassment. This change in law means that, as of the release of this alert, New York City employees can bring sexual harassment claims based on conduct that occurred on or after May 9, 2015.

**Extended Application of City Sexual Harassment Laws to Small Employers (effective as of May 9, 2018)**

The New York City Human Rights Law’s provisions with respect to gender-based harassment now apply to employers of all sizes, as with the New York State Human Rights Law, instead of only to employers with four or more employees. The law also clarifies that sexual harassment is a form of gender-based discrimination under the New York City Human Rights Law.

**Required Anti-Harassment Handout and Posters (effective as of September 6, 2018)**

Like New York State, New York City is ramping up its efforts to ensure effective sexual harassment training of employees. As a first step, New York City employers will be required to provide all new hires with a handout that includes the following information: (i) an explanation that sexual harassment is a form of unlawful discrimination under federal, state and local law; (ii) a description of and examples of sexual harassment; (iii) information about the administrative complaint processes available through the New York City Commission on Human Rights, the New York State Division of Human Rights, and the U.S. Equal Employment Opportunity Commission, and (iv) an explanation of the prohibition against retaliation for claiming sexual harassment. This information sheet will be made available for download on the New York City Commission on Human Rights’ website. Employers will be permitted to provide this information as part of their employee handbooks rather than handing out the information sheet as a stand-alone document.

New York City employers will also be required to conspicuously display an “Anti-Sexual Harassment Rights and Responsibilities” poster in both English and Spanish, which will include the same information as the handout. Like the handout, the posters will also be available for download from the Commission’s website.

**Mandatory Anti-Harassment Training (effective April 1, 2019)**

The New York City law will require employers with 15 or more employees in total to provide *interactive* anti-harassment training to their employees based in New York City. Like the State law, the City law will require this training to occur once annually. However, unlike the State, the City law will require that employees who work more than 80 hours/year receive the training within 90 days of their hire, effectively requiring most New York City employers to conduct trainings on a frequent basis; employers that engage in year-round hiring may need to conduct trainings at least quarterly.
This training must be participatory, and may be conducted either by a live trainer or in an interactive computer-based or online format. The training must include elements of required trainings under State law (i.e., an explanation of sexual harassment as a form of unlawful discrimination under federal, state, and local law, a description of and examples of what sexual harassment is, any internal complaint process available to employees, all administrative procedures available for redress, and an explanation that retaliation for claiming sexual harassment is prohibited). In addition, the City law requires trainings to include information about bystander intervention and to address the specific responsibilities of supervisors in preventing sexual harassment and retaliation. The New York City Commission on Human Rights will create online training resources for employers to use in order to comply with the law. Like the New York State anti-harassment training program, the New York City model training program will serve as a minimum standard for employers.

The City law will also require employers to keep training records and signed employee acknowledgments of their taking the training for at least three years.

NEXT STEPS FOR EMPLOYERS

The expanded coverage of these new laws touches any employer with employees in New York State and/or New York City. This means that any employer with at least one employee in New York State must review and revise its anti-sexual harassment policies in the upcoming months to comply with the new state laws. In just two months, employers will need to be mindful of the new laws regulating how to draft and negotiate separation and settlement agreements seeking to resolve sexual harassment claims.

Without any judicial interpretation of these laws available at this time, employers would be prudent to take a conservative approach and: (1) make it a standard practice that any separation or settlement agreement that includes the release of sexual harassment claims be presented for consideration by the employee for 21 days and that the employee be provided an additional 7 days to revoke acceptance, and (2) carve out sexual harassment claims from any arbitration agreements or arbitration provisions with employees. Employee manuals and training programs also need to be brought into compliance with these new laws, as applicable, including, for New York City employers, ensuring that trainings are frequent, participatory, and include the mandatory elements of bystander intervention techniques and supervisory responsibilities.

Employers with operations outside of New York also need to stay alert to legal changes affecting the resolution of sexual harassment claims. On the federal level, Congress is considering the bipartisan “Ending Forced Arbitration of Sexual Harassment Act of 2017,” that, if enacted, would void forced arbitration agreements that bar sexual harassment lawsuits. These kinds of measures have drawn widespread support. In February 2018, a bipartisan coalition of attorneys general from every U.S. state and territory signed a letter urging Congress to end confidential, forced arbitration of cases alleging workplace sexual harassment.
Whether Congress passes such legislation or not, employers should expect similar activity at the state level. Washington State already prohibits employment agreements and policies that would bar employees from disclosing sexual harassment/assault in the workplace and prohibits mandatory arbitration of claims brought under Washington’s Law Against Discrimination. As of the date of this alert, seven other states are considering legislation that would restrict confidentiality agreements about sexual harassment claims, and bills that would restrict employment arbitration agreements and/or mandating sexual harassment training are under consideration in several states.

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