

## New York State Enacts Sweeping Sexual Harassment Laws

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The 2018-2019 [New York State Budget](#) (“Budget”), which was enacted on April 12, 2018, includes several new state laws concerning sexual harassment in the workplace that will affect both public and private employers. (For those in New York City, similar proposed laws<sup>1</sup> await Mayor Bill de Blasio’s signature and will likely become effective soon.) The new state laws, which will take effect on various dates throughout 2018 or later, will impact private employers by (i) prohibiting mandatory pre-dispute arbitration clauses relating to sexual harassment complaints, (ii) banning nondisclosure agreements for sexual harassment claims, (iii) requiring employers to enact written sexual harassment policies and conduct annual sexual harassment preventative training for all employees, and (iv) expanding liability for sexual harassment claims to certain non-employees.

### **A. Prohibition of Mandatory Pre-Dispute Arbitration Clauses**

The Budget will add a new section 7515 to the New York Civil Practice Law that states that employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses in written employment contracts requiring the resolution of allegations or claims of an unlawful discrimination practice of sexual harassment. This prohibition applies only to contracts entered into *after* the effective date of this law.

If a contract entered into after the effective date of this law contains a prohibited mandatory arbitration clause, the clause will be rendered null and void without affecting the enforceability of any other provision in the contract.

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<sup>1</sup> On April 11, 2018, the New York City Council enacted four bills to significantly expand the obligations of many employers to prevent sexual harassment. The four bills include (1) mandatory sexual harassment training for New York City employers with 15 or more employees, (2) a new sexual harassment poster, (3) more time to file a complaint with the City Commission on Human Rights, and (4) expanded employer coverage under the New York City Human Rights Law (“NYCHRL”) for sexual harassment claims.

Employers may continue to use mandatory pre-dispute arbitration clauses for all other claims unrelated to sexual harassment so long as the clauses are agreed to by the parties and are in accordance with federal law.

Additionally, where a conflict exists between a collective bargaining agreement and this law pertaining to mandatory pre-dispute arbitration clauses, the collective bargaining agreement will be controlling.

This provision will take effect 90 days following the Budget's enactment, on July 11, 2018.

### **B. Ban of Nondisclosure Agreements**

The Budget will add two new provisions (New York General Obligations Law § 5-336 and New York Civil Practice Law § 5003-b) that will act to ban nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims, unless the condition of confidentiality is complainant's and/or plaintiff's preference. The term "sexual harassment claim," however, is not defined in either of these two new sections.

Similar to the requirements under the federal Age Discrimination in Employment Act, if the complainant and/or plaintiff prefers to include a confidentiality clause in a settlement or agreement, then the complainant and/or plaintiff will be provided 21 days after receiving such settlement or agreement to consider the clause. Further, the complainant and/or plaintiff will have a seven-day revocation period following the execution of such settlement or agreement, and the confidentiality clause will not become effective or enforceable until the revocation period has expired.

These provisions will take effect 90 days following the Budget's enactment, on July 11, 2018.

### **C. Mandatory Sexual Harassment Policy and Annual Sexual Harassment Prevention Training**

Public and private employers in New York State will be required to maintain a written sexual harassment policy, and to provide annual training to employees, pursuant to a new provision, New York Labor Law § 201-g. To assist employers in creating a policy and training program, the New York State Department of Labor ("NYSDOL"), in consultation with the New York State Division of Human Rights, will (i) create and publish a model sexual harassment prevention guidance document and a sexual harassment prevention policy that employers may use to satisfy their obligations under the law, and (ii) create a model sexual harassment training program addressing appropriate conduct and supervisor responsibilities.

The model sexual harassment prevention policy must:

- state that sexual harassment is prohibited,

- provide examples of prohibited conduct that would constitute unlawful sexual harassment,
- contain information regarding federal and state law concerning sexual harassment and remedies available to victims of sexual harassment,
- include a statement that there may be applicable local laws on sexual harassment,
- contain a complaint form,
- include a procedure for the investigation of complaints,
- 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 sexual harassment to continue, and
- state that retaliation against those who complain of sexual harassment or who testify or assist in any proceeding is unlawful.

Employers will be required to either adopt the model sexual harassment prevention policy or establish a policy that equals or exceeds the minimum standards provided by the model policy. The policy must be provided in writing to all employees.

The State's model sexual harassment training program will include:

- an explanation of sexual harassment and examples thereof,
- information regarding the federal and state laws concerning sexual harassment and the remedies available to victims of sexual harassment, and
- information concerning employees' rights of redress and all available forums for adjudicating complaints.

Employers will be required to either use the model sexual harassment prevention training program or establish a training program for employees to prevent sexual harassment that equals or exceeds the minimum standards provided by the model training. In addition, employers will be required to provide the training programs to all their employees and apply the NYSDOL's sexual harassment prevention policy. The law does not specify the length of the training or the format (i.e., in person versus online).

These sexual harassment policy and training provisions will take effect 180 days following the Budget's enactment, on October 9, 2018.

New York City employers may be subject to additional training requirements.<sup>2</sup>

#### **D. Protections for “Non-Employees”**

The Budget will create a new provision—New York Labor Law § 296-d—that expands sexual harassment protections to non-employees. Employers may be liable to contractors, subcontractors, vendors, consultants, or other non-employees providing services to the employer with respect to sexual harassment. Such liability will be available when (i) the employer, its agents, or supervisors knew (or should have known) that a non-employee was subjected to sexual harassment in the workplace, and (ii) the employer failed to take immediate and appropriate corrective action. This provision took effect on April 12, 2018.

#### **E. Additional Provisions for Public Employers**

Although not applicable to private employers, the Budget enacts two new provisions for public employers and contractors doing business with New York State—one relating to requirements for competitive bid statements and the other concerning reimbursement by public employees:

##### *1. Requirements for Contractor’s Competitive Bid Statement*

New York Finance Law § 139-L will require a state contractor to certify in its competitive bid statement that it (i) has “implemented a written policy addressing sexual harassment prevention in the workplace,” and (ii) “provides annual sexual harassment prevention training to all of its employees.” When a competitive bid statement is not required, the department, agency, or official can require a bid statement to include the information noted above. This provision will take effect on January 1, 2019.

##### *2. Reimbursement by Public Employees Found Liable for Intentional Wrongdoing*

Under New York Public Officers Law § 17-a, a public employee who has been found personally liable for intentional wrongdoing related to a claim of sexual harassment must reimburse any State agency or entity that makes a payment on his or her behalf

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<sup>2</sup> The new state law—and the city law, if enacted—will require employers to provide employees with “interactive” training on sexual harassment. However, in addition to the requirements under the state law, the more expansive city law would require New York City-based employers to provide employees with the following: (i) an explanation of sexual harassment as a form of unlawful discrimination under local law, in addition to state and federal law; (ii) a description of the complaint process available to employees through the New York City Commission on Human Rights, in addition to the New York State Division of Human Rights and the federal Equal Employment Opportunity Commission; (iii) an explanation, with examples, of what constitutes “retaliation” under the NYCHRL; (iv) information concerning bystander intervention; and (v) the responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation. New York City-based employers under the city law would also be required to maintain for three years records of all training, including a signed employee acknowledgement. Notably, the state law applies to all employers in the state while the city law applies only to employers with 15 or more employees who work 80 or more hours in a calendar year in New York City.

within 90 days of the State agency's or entity's payment. This provision took effect on April 12, 2018.

### **What New York Employers Should Do Now**

- Review, when they become available, New York State's model policies and training programs on sexual harassment in the workplace.
- Review and revise, as necessary, policies regarding sexual harassment in the workplace, and consider including references to non-harassment of certain non-employees.
- Prepare to provide sexual harassment training for employees and managers on an annual basis.
- Review any arbitration documents or programs requiring the arbitration of sexual harassment claims to determine if any revisions are required on a going-forward basis.
- Revise separation and settlement agreements, including nondisclosure provisions pertaining to sexual harassment claims, to provide for the applicable review and revocation period.
- Train human resources professionals and internal legal counsel regarding nondisclosure provisions in settlement agreements relating to sexual harassment claims.
- Train human resources professionals and managers on the new New York State requirements regarding non-harassment of non-employees.
- If you are based in New York City and the proposed annual sexual harassment training requirements are signed into law by Mayor de Blasio, then reconcile the differences in the requirements under the state and city laws so that your training program incorporates all of the rules and parameters set forth under both state and city laws.

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