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ACT NOW ADVISORY

New York Releases Updated Guidance on Expansion of State Human Rights Law

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New York State has updated its guidance on the new rules under the New York State Human Rights Law ("NYSHRL") regarding discrimination, harassment, and retaliation claims. In particular, the Frequently Asked Questions ("FAQs") now provide additional clarity on employers' obligations under the expanded NYSHRL, as detailed in our earlier Advisory.

Most notably, the revised FAQs require employers to provide employees sexual harassment training and a notice (including an attachment or link to the training materials, policy, and complaint form) in both English and the employee's primary language if that language is listed as one of the languages for which the State has provided templates (including Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian). The State also broadened sections of the guidance that previously related only to sexual harassment claims to include discrimination claims generally, where applicable and required by the expanded NYSHRL.

Guidance on the Distribution of a Sexual Harassment Notice and Policy as Well as Training Information

New York employers are required to distribute, (i) at the time of hire, and (ii) upon each annual training, a notice containing the employer's:

- sexual harassment prevention policy, and
- the information presented as part of the sexual harassment prevention training program ("Training Materials").

The FAQs clarify that the Training Materials, which must be included as part of the notice, consist of "any printed materials, scripts, Q+A's, outlines, handouts, PowerPoints slides, etc." This notice must be delivered in writing, which includes the option of print or digital delivery (e.g., via e-mail) and must link to or include (as an attachment or printed copy) the policy and Training Materials. The FAQs also recommend that employers provide the notice prior to, or at the beginning of, an employee's first day of work to

satisfy the "at the time of hire" notice requirement. For current employees, the notice must be provided during each annual training.

Notably, the Sexual Harassment Prevention Notice, listed as "Sexual Harassment Prevention Poster" on the State's website, was revised to include a reference to the Training Materials. In line with the FAQs, employers may supply employees with the Training Materials by either (i) providing a link to the Training Materials in lieu of a hard copy, or (ii) attaching the Training Materials to the notice.

The FAQs note that the use of materials relating to training that have been provided by the New York City Commission on Human Rights may also be used by an employer to satisfy obligations under the NYSHRL.

Guidance on Translation Requirements of Sexual Harassment Notice, Policy, and Training Materials

Employers are required to provide the sexual harassment notice, which includes a copy of the policy and the Training Materials, in both English **and** in an employee's primary language, if the primary language is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian. Compliant translated materials were posted by the State earlier this year. Model training videos can be found here in the "Training Videos" section. (Note: These videos provided by the State are *not* interactive; thus, employers must add an interactive component in order to comply with the NYSHRL.) If an employee designates a primary language not included in the list above, the FAQs "strongly encourage" employers to provide a policy and training in the language spoken by the employee since they may be held liable for the conduct of all their employees. Furthermore, the FAQs indicate that the State may add additional languages to its translated materials in the future.

Guidance on Translation of Non-Disclosure Terms or Conditions in Settlement Agreements

As reported previously, unless it is the claimant's preference to include them, the law prohibits non-disclosure and confidentiality terms or conditions in agreements resolving discrimination, harassment, and retaliation claims, to the extent they restrict the complainant from disclosing the facts and circumstances of the underlying claims. The complainant will have a non-waivable 21-day review period to consider the clause, plus a seven-day revocation period before a non-disclosure provision can be included in the document resolving the claims.

The updated FAQs remind employers of this recent change in the law, which voids such an agreement "to the extent that it prohibits or otherwise restricts a complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled."

Accordingly, these clarifications should be incorporated into non-disclosure clauses. The expanded restrictions on non-disclosure agreements, which now pertain to discrimination and retaliation claims (and not only sexual harassment claims), went into effect October 11, 2019.

The FAQs remind employers that "[a]ny such [non-disclosure] term or condition must be provided in writing to all parties in plain English, and, if applicable, the primary language of the person who complained." This broad wording could be interpreted to require translating the relevant non-disclosure term or condition into ***any*** language that the employee or complainant indicates is their primary language (and not just one of the languages in which the State has provided model materials).

Guidance on Confidentiality Agreement Provisions Effective January 1, 2020

Finally, the FAQs also remind employers that, effective January 1, 2020, the law voids any provision in a contract or other agreement that restricts the disclosure of "factual information related to any future claim of discrimination" unless the agreement "notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee." As we noted in our prior Advisory, this requirement pertains to any confidentiality clause entered into by an employee, such as a confidentiality agreement entered into as a condition of employment.

What New York Employers Should Do Now

- If you use your own policy and training documents (and not the State's model materials), you can comply with the notice requirements by providing employees who have indicated that their primary language is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian either (i) the model materials available on the State's website, or (ii) your own sexual harassment notice (including the sexual harassment policy and the Training Materials) that is translated into these languages.

- Consider, as the FAQs recommend, whether it also makes sense to provide translated materials for languages where the State has not provided model materials, particularly where a large percentage of your workforce speaks a language that is not one of those into which templates have been translated.

- Given the text of the NYSHRL and the FAQs, consider translating any non-disclosure and confidentiality term or condition related to discrimination claims in any settlement document into the primary language indicated by a complainant.

- Prior to January 1, 2020, revise confidentiality language in your employment agreements (including contracts, handbooks, policies, and settlement agreements) to ensure compliance with employee disclosure rights under the law.

- Finally, review the State's Combating Sexual Harassment website frequently for updates, including any new guidance or template documents.

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