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LABOR AND EMPLOYMENT

ALERT

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NEW YORK STATE AND CITY MOVE AGGRESSIVELY AGAINST SEXUAL HARASSMENT

By M. Christine Carty

Since spring 2018, New York State and New York City have been aggressively moving to protect against sexual harassment in the workplace and, in so doing, have recently created numerous compliance obligations for employers. In April, 2018, New York State ("NYS") enacted a bundle of new laws to combat sexual harassment. In May 2018, New York City ("NYC") enacted new legislation with the same purpose. Some of these laws and regulations are already in effect, but the laws with substantial affirmative obligations for employers will become effective over the next few months. This Alert summarizes the new laws, regulations and requirements, provides a guide to impending changes, and identifies the requirements that remain subject to change.

New York State Requirements.

The New York State legislation, part of the Governor's "Women's Opportunity Agenda," encompasses a wide range of initiatives, some of which are compliance-intensive.

Policy and Training. A new section of the NYS Labor Law (§201-g) requires every New York State employer to adopt a sexual harassment prevention policy. Employers must adopt either the NYS form policy or one that "equals or exceeds" the NYS form. In addition, the new Labor Law section requires employers to provide annual interactive sexual harassment training to all of their employees either using the NYS model training program or one that "equals or exceeds" the instruction in the model program, which is regarded as a minimum. The new section of the Labor Law is effective on October 9, 2018. On August 23, 2018, NYS published the draft model sexual harassment prevention policy, together with a model sexual harassment training program, a model complaint form, Guidance concerning Sexual Harassment for employers, and FAQs entitled "Combating Sexual Harassment." The comment period regarding the draft documents closed on September 12, 2018. It is not known when the final of the model sexual harassment policy and related documents will be published. The FAQs state that sexual harassment training for all employees must be completed by January 1, 2019. Because the January 1 deadline is not mandated by the statute and compliance by January 1 will be very challenging for businesses in retail and other seasonal industries, it is possible that the compliance date may change.

Government Contracts. An amendment to the NYS Finance Law (§139-1) requires that all competitive bids for government contracts contain an affirmative representation in specifically mandated language that the bidder has implemented a written policy prohibiting sexual harassment in the workplace and a separate prevention plan. The bidder must specify that both the policy and the training program meet the minimum requirements stated by the NYS Labor Law. This requirement is effective on January 1, 2019.

Non-Disclosure Agreements. New sections in the NYS Civil Practice Law and Rules ("CPLR §5003-b") and the NYS General Obligations Law (§5-336) prohibit employers from including non-disclosure provisions in agreements settling litigation, claims or disputes of sexual harassment, unless the complaining party requests confidentiality. If a

non-disclosure provision is part of a settlement agreement, in order to be effective, the complaining party must have 21 days to consider whether to sign and seven days to revoke. The law became effective on July 11, 2018.

Non-Employees. A new section of the NYS Human Rights Law ("NYHRL §296-d") prohibits sexual harassment of independent contractors, vendors and other non-employees on an employer's premises. Under new NYHRL § 296-d, an employer can be held liable to a non-employee if the employer or its agents or supervisors "knew or should have known" of sexual harassment toward the non-employee and "failed to take immediate appropriate corrective action." The provision expressly allows consideration of the extent of the employer's control over the harasser. The amendment became effective on April 11, 2018.

Arbitration Provisions. A new section of the CPLR (§7515) prohibits New York employers from requiring employees to sign provisions agreeing to arbitrate sexual harassment claims, *except if the ban is inconsistent with federal law*. This provision went into effect on July 11, 2018. The statute may be preempted by the Federal Arbitration Act and U.S. Supreme Court precedent, a fact that this CPLR provision acknowledges.

Attorneys' Fees and Small Businesses. In addition, publicity surrounding the enactment of the NYS legislative package to combat sexual harassment emphasized other existing features of the NYHRL that are more favorable to women than other protected categories. An amendment to the NYHRL (§297.10) that became effective in January 2016 allows the recovery of attorneys' fees in cases of employment discrimination and credit discrimination based on sex, while attorneys' fees are not awarded for other types of employment discrimination under the NYHRL. Further, another amendment (§292.5) effective on January 19, 2016, expanded the application of the NYHRL in sexual harassment complaints to all employers, regardless of the number of employees. The NYHRL applies in other types of employment discrimination to protect employees working for employers with more than four employees.

New York City Requirements

The "Stop Sexual Harassment in New York City" Act was touted by the Mayor as designed to "be among the strictest anti-sexual harassment legislation in the country." The new NYC law includes:

Training. Amendments to the NYC Human Rights Law ("NYCHRL") include a mandate that employers with 15 or more employees conduct "interactive" sexual harassment training of all employees beginning on April 1, 2019, complete the training within one year and conduct it annually thereafter. The NYCHRL requires the NYC Commission on Human Rights ("Commission") to post on its website training modules that satisfy the training requirements under the NYCHRL, but does not provide a deadline to do so. The training modules are not yet posted. After April 1, 2019, new employees must receive the anti-sexual harassment training within 90 days of hire. Online training is permitted, as long as the training is "interactive." The NYCHRL provides information about what features constitute interactive training, such as the opportunity for "participatory teaching [in which there is] trainer/trainee interaction." Unlike the NYS Labor Law, the NYCHRL requires that employers keep a record of the trainings, including signed employee acknowledgments, for three years.

Statute of Limitations. An amendment to the NYCHRL increases the statute of limitations for sexual harassment claims from one to three years. This limitations period exceeds both the federal and state limitations periods for filing sexual harassment claims.

Small Employers Covered. The NYCHRL prohibition against sexual harassment claims has been extended to all employers, regardless of the number of employees.

Posters and Information Sheet. As of September 6, 2018, employers are required to post a NYC Human Rights Commission issued poster in the

workplace and deliver to each new employee an information sheet published by the Commission. The poster and information sheet can be found at: https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page

These additions to the NYCHRL, coupled with the already-existing low level of proof required to show sexual harassment under the NYCHRL, will make NYC one of the most challenging jurisdictions for employers in managing gender related workplace issues. A recent court decision, *Swiderski v. Urban Outfitters, Inc.*, held that "[u]nder [New York] city law, unlike under the state and federal law, a plaintiff need not necessarily 'show that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, … but instead must show only 'unwanted' gender based conduct".. "Liability under city law should be determined by the existence of unequal treatment and questions of severity and frequency reserved for consideration of damages…" In conducting the NYS and NYC training, employers should emphasize explicitly to managers and supervisors this broad-based definition of sexual harassment.

If an employer wishes to design its own sexual harassment prevention policy, under the NYS Labor Law, the policy must:

1. Prohibit sexual harassment as set forth in guidance provided by the NYDOL and provide examples of sexual harassment;
2. Include information concerning the federal and state statutory provisions regarding sexual harassment and the remedies of each;
3. Include a standard complaint form;
4. Include an investigation procedure that is both timely and confidential;
5. Provide employees with information about how to complain about sexual harassment and all available forums to do so both internally and judicially; and
6. Clearly state that sexual harassment is a form of employee misconduct that will result in disciplinary action against employees engaging in such conduct and against managers who allow it to continue;
7. Clearly state that retaliation for complaining about sexual harassment or assisting someone who has made such a complaint is unlawful.

The draft model sexual harassment prevention policy posted by the NYDOL has been criticized by commentators as incorrectly characterizing the NYS law standards and as failing to adequately reflect best practices regarding requests for confidentiality. Accordingly, employers should consider tailoring their policy to current NYS law, rather than adopt the NYS model policy at this time, or wait until the publication of the final model policy before making changes to their policies.

Since the NYS law and the NYC law both require mandatory sexual harassment training and recite specific elements to be included in the training, it will be incumbent on employers to align the training to comply with both statutes after April 1, 2019. An employer might choose to wait for the final NYS model sexual harassment policy, training guide, FAQs and Guidance. The NYS Labor Law requires that the minimum requirements for sexual harassment training are that it:

1. Explain sexual harassment in a way that is consistent with NYDOL guidance and provide examples of sexual harassment;
2. Provide information concerning the federal and state laws prohibiting sexual harassment and the remedies; and
3. Provide information about an employee's rights to complain and how to do so and provide all available forums to complain, including internal, administrative and judicial.

The NYCHRL requirements for an employer-designed training are more numerous. The NYCHRL includes all of the above, plus the requirement of

an explanation that retaliation is prohibited, information concerning "bystander intervention" and how to engage in bystander intervention and the specific responsibilities of supervisors and managers to prevent sexual harassment. The NYC Commission website directs viewers to www.ihollaback.org to obtain information about bystander intervention.

We will provide further information once NYS and NYC issue additional guidance, policies and policies. In the meantime, employers should immediately:

- post the NYC Commission mandated poster and include the NYC Commission mandated one page information sheet in its onboarding packets for New York City based employees; and

- begin a review of their sexual harassment prevention policy and training materials and/or begin planning to meet a training deadline for anti-harassment training over the next several months.◆

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