CHANGES TO NEW YORK STATE AND NEW YORK CITY WORKPLACE HARASSMENT LAWS

By Felicia S. Ennis, Esq.

The #MeToo movement has launched a nationwide dialogue over the continued prevalence of sexual harassment in the workplace. In response, New York State and New York City have both recently enacted sweeping legislation, taking aggressive steps to implement stronger protections against workplace harassment.

New York State Legislation

The New York State Budget Bill for Fiscal Year 2019 includes new sexual harassment laws impacting employers in New York State. Signed into law on April 12, 2018 by New York Governor Andrew Cuomo, this anti-sexual harassment legislation includes protection for "non-employees," a ban on mandatory arbitration provisions and non-disclosure agreements for sexual harassment claims and the implementation of mandatory sexual harassment training and written anti-harassment policies. The following are some key components of this legislation:

- ***Effective immediately – Protection for "Non-Employees."*** The New York State Human Rights Law ("NYSHRL") has been amended to extend protection to "non-employees" who provide services under a contract, such as independent contractors, against sexual harassment (interns are already protected). An employer now may be held liable if it knew or should have known that a covered non-employee was sexually harassed at its workplace and did not take appropriate corrective action.

- ***Effective July 11, 2018 – Ban on NDAs Relating to Sexual Harassment Claims.*** Employers will no longer be permitted to use nondisclosure provisions in settlement agreements or other agreements to prevent individuals from disclosing or discussing the facts underlying sexual harassment claims unless it is the complainant's preference to maintain confidentiality. An employer must provide notice of a non-disclosure provision, and the complainant must receive 21-days to consider whether to accept or reject the provision. If the complainant accepts the non-disclosure provision, the complainant will then have seven (7) days to revoke acceptance. The nondisclosure clause will not become effective or enforceable until the revocation period has expired.

- ***Effective July 11, 2018 - Ban on Mandatory Arbitration for Sexual Harassment Claims.*** Mandatory arbitration clauses regarding claims of workplace sexual harassment will be prohibited. Any such clause contained in a contract entered into after the effective date of this legislation, with certain exceptions, will be rendered void. Arbitration clauses in collective bargaining agreements are exempt from this prohibition, as well as arbitration clauses dealing with other types of claims. The enforceability of the new law may be limited where an arbitration clause is subject to the Federal Arbitration Act as a matter of federal preemption of state law.

- ***Effective October 9, 2018 - Mandatory Sexual Harassment Policy***. The new law requires all New York State employers to either adopt a model sexual harassment policy to be developed by the New York State Department of Labor ("NYSDOL"), together

with the New York State Division of Human Rights ("NYSDHR"), or develop their own, so long as their own policy meets or exceeds the model's standards. The model sexual harassment prevention policy is required to contain the following elements:

1. A statement prohibiting sexual harassment;
2. Examples of prohibited conduct that would constitute sexual harassment;
3. Information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims, along with a statement that there may be additional applicable laws;
4. A standard complaint form;
5. The procedure for timely and confidential investigation of complaints;
6. A statement informing employees of their rights of redress and available forums for adjudicating sexual harassment complaints administratively and judicially;
7. A statement that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and managers and supervisory personnel who knowingly allow such behavior to continue; and
8. A statement that retaliation against individuals reporting sexual harassment or who testify or assist in any proceeding is unlawful.

- ***Effective October 9, 2018 - Mandatory Sexual Harassment Training*.** The law also requires the NYSDOL and NYSDHR to develop a model sexual harassment prevention training program and requires employers in New York State to either present the state-approved model or their own model compliant with state standards on an annual basis. The training program must be interactive, and contain the following elements:

    1. An explanation of sexual harassment;
    2. Examples of conduct that would constitute unlawful sexual harassment;
    3. Information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims; and
    4. Information concerning employees' right of redress and all available forums for adjudicating complaints.

The model training must also include information addressing conduct by supervisors and additional responsibilities for supervisory personnel.

- ***Effective January 1, 2019 – State Contracts***. New York Finance Law § 139-L will require all companies that submit competitive bids on state contracts to provide a statement with their bid that they have implemented a written policy addressing sexual harassment prevention in the workplace and that they provide annual training for all employees. State entities may also require a compliance statement in contracts that do not require a competitive bid.

New York City Legislation

On May 9, 2018, New York City Mayor Bill de Blasio signed into law the Stop Sexual Harassment in NYC Act (the "Act"), aimed at addressing and preventing sexual harassment in the workplace.

- ***Effective immediately*** **-** The Act amends the New York City Human Rights Law ("NYCHRL"), requiring the New York City Commission on Human Rights (the "City Commission") to expand its policy statement to expressly include sexual harassment as a form of discrimination. The Act further amends the NYCHRL to extend the statute of limitations for filing harassment claims with the City Commission from one year to three years after the alleged conduct. In addition, the NYCHRL now covers all employers, regardless of size, with respect to gender-based claims. This aligns the NYCHRL with the New York State Human Rights Law's coverage of sexual harassment claims. All other portions of the NYCHRL are applicable only to employers of four or more employees within the city.

- ***Effective July 8, 2018*** – City contractors will be required to include their practices, policies, and procedures "relating to preventing and addressing sexual harassment" as part of an existing report required for certain contracts pursuant to the City Charter and corresponding rules.

- ***Effective September 6, 2018*** – Employers will be required to conspicuously display an anti-sexual harassment rights and responsibilities poster and distribute an information sheet on sexual harassment to new hires, both of which will be promulgated by the City Commission.

- ***Effective April 1, 2019*** - The law requires employers with 15 or more employees to provide interactive sexual harassment training to new employees after 90 days of employment and to continue to provide interactive sexual harassment training to all employees on an annual basis. Additionally, the Act requires employers to obtain from each employee a signed acknowledgment that he or she attended the training, which must be kept for three (3) years. The training must cover a number of topics, including:

    1. Explanation of sexual harassment as a form of unlawful discrimination under city, state and federal law;
    2. Descriptions and examples of sexual harassment;
    3. Explanation of the complaint process - both internally and through the City Commission, New York State Division of Human Rights and the Equal Employment Opportunity Commission (EEOC);
    4. The prohibition of retaliation; and
    5. The importance of bystander intervention.

Employers may use computer or online training programs to satisfy the requirements of this provision. New employees (including interns) expected to work more than eighty hours per calendar year must complete such training within ninety days of hire.

To the extent that the requirements under New York State and New York City laws overlap, NYC employers must ensure they are meeting the requirements of both laws. Employers who do not have anti-harassment policies and training programs in place should speak to a legal professional and develop and implement them immediately. Employers that already have anti-harassment policies and training programs should have them reviewed by a legal professional to ensure compliance with these newly enacted laws.

This material has been prepared for informational purposes only, and is not intended to provide, and should not be relied on for, legal or tax advice. If you have any specific legal or tax questions regarding this content or related issues, then you should consult with your professional legal or tax advisor.