Labor & Employment Law Alert: Changes to New York's Sexual Harassment Laws

On April 12, 2018, Governor Cuomo signed the FY 2019 budget, which contains several provisions strengthening New York's sexual harassment laws and creating new obligations for employers. The day the budget was signed, employers became liable for sexual harassment of non-employees such as contractors, subcontractors, consultants and vendors. Also, State and local government employees can now be held personally liable for their proportional share of any monetary judgment for their intentional wrongdoing related to a sexual harassment claim.

Additional changes are about to take effect. Beginning **July 11, 2018**, the use of nondisclosure provisions in settlement agreements for sexual harassment claims will be considered permissible only if the complainant: (1) desires a confidential settlement; (2) has at least 21 days to consider the nondisclosure before accepting its terms; and (3) has seven days to revoke acceptance of a nondisclosure provision in the settlement agreement.

Also effective **July 11, 2018**, mandatory arbitration agreements with employees related to sexual harassment claims will be deemed "null and void... except where inconsistent with federal law." However, this change may prove meaningless because the Federal Arbitration Act authorizes mandatory arbitration agreements with employees and preempts State law. Further, arbitration agreements are permissible if part of a collective bargaining agreement.

By **October 9, 2018**, the New York State Department of Labor ("NYSDOL") and the New York State Division of Human Rights ("NYSDHR") must issue a model policy to prevent sexual harassment. Employers must either adopt the model policy or develop a substantially similar policy that provides employees with at least the same amount of protection and information. The model sexual harassment policy must include:

- A statement prohibiting sexual harassment;
- Examples of prohibited conduct that constitutes sexual harassment;
- Information regarding federal and State statutes involving sexual harassment and remedies available to survivors of sexual harassment, including a statement that there may be other applicable sexual harassment laws;
- A standard complaint form;
- The process for both confidential and timely investigations of sexual harassment complaints;
- A statement explaining employees' rights of redress and the available forums for resolving sexual harassment claims;
- A statement explaining that sexual harassment is a form of employee misconduct and the employer will discipline those who engage in sexual harassment or fail to correct such misconduct; and

- A statement that it is illegal to retaliate against an employee who reports sexual harassment or testifies in a proceeding.

The new law will also require the NYSDOL and NYSDHR to develop model sexual harassment prevention training. It is unclear whether online training will meet this requirement, as the training must be "interactive" and must include the following:

- An explanation of what constitutes sexual harassment;
- Examples of prohibited conduct that constitutes sexual harassment;
- Information concerning federal and State statutes involving sexual harassment and remedies available to survivors of sexual harassment; and
- Information explaining employees' rights of redress and the available forums for resolving sexual harassment claims.

Starting **October 9, 2018**, employers must provide sexual harassment training to all employees annually, and provide employees a copy of their written sexual harassment policy each year.

Additionally, starting **January 1, 2019**, bids for work with the State or any of its public agencies or departments must certify that the bidder has a written sexual harassment policy and provides its employees with yearly sexual harassment prevention training. Any bid that does not include this certification will not be considered by the State, unless the contractor establishes valid reasons why it cannot fulfill the requirements. However, this provision only applies to contracts where competitive bidding is required. If competitive bidding is not required, the State may use its discretion as to whether such certification is required.

Employers should review their sexual harassment policies, training and related arbitration agreements to ensure compliance.

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