Labor & Employment Law Alert: New York State Issues Final Model Sexual Harassment Policy and Training Requirements

On October 1, 2018, the New York State Department of Labor ("NYSDOL" or "State") issued its final sexual harassment training materials and model policy in consultation with the New York State Division of Human Rights ("NYSDHR"). In response to public comments regarding earlier drafts of the proposed materials, the State incorporated a significant number of changes into the final versions.

Notably, the State modified its prior directive that employees must receive sexual harassment training by January 1, 2019. The guidance is now seemingly more consistent with the statutory language, giving employers until October 9, 2019 to provide sexual harassment training to all employees. Thereafter, employers must continue to provide such training to all employees on an annual basis. The final guidance further clarifies what constitutes acceptable "interactive" training, which may include web-based training as long as there is an option for employees to either answer questions at the end of a section or submit questions online and receive immediate or timely answers. In-person or live training will also be considered interactive if employees are either asked questions or allowed to pose questions during the presentation. The State also encourages the use of an opening activity, role playing, or group discussions. However, simply providing an employee with a training video to watch or a document to read, without any "feedback mechanism or interaction", will not be considered interactive.

The State has also removed its prior draft requirement that new employees receive sexual harassment training within 30 calendar days of their hire. Under the final guidance, new employees should complete sexual harassment training "as soon as possible."

There are also a number of changes to the model sexual harassment policy. The draft policy included a "zero-tolerance policy for any form of sexual harassment", which has been removed. Additionally, while the draft materials required that any sexual harassment investigation be completed within 30 days, the final version states instead that an investigation must be "commenced immediately and completed as soon as possible."

The final model policy includes some new language and requirements. For example, it adds "self-identified or perceived sex" and "gender expression" as further bases for sexual harassment. Moreover, the policy adds "threats of physical violence outside of work hours" as an example of unlawful retaliation in response to an employee's sexual harassment complaint, and advises employees that they may seek the advice of an attorney.

Employers should ensure that they issue a written sexual harassment policy by October 9, 2018 that meets or exceeds the NYSDOL's minimum standards. Those standards can be found at the NYSDOL's website. The State will also offer the finalized materials on the NYSDOL's website in Spanish, Korean,

Bengali, Russian, Italian, Polish and Haitian-Creole “as quickly as possible” for use with employees whose preferred language is other than English. Additional languages may be added by the State in the future. Employers are reminded that they should provide their sexual harassment policy and training in the primary language(s) spoken by their employees. If the training materials and policy are unavailable in the employee’s primary language, the employer can provide the materials in English if the employee is able to sign documentation explaining that he/she has the ability to read and understand English.

You may also recall that the new sexual harassment law seeks to limit the use of Nondisclosure Agreements (NDAs) when sexual harassment claims are resolved via settlement. Under the new law, NDAs cannot be used to keep factual allegations of sexual harassment confidential unless preferred by the employee, and the employee has 21 days to review the NDA before signing and seven days to revoke after acceptance. The State has opined under its online “FAQ” section that the 21-day review period is mandatory and cannot be waived or shortened. Furthermore, the State has indicated that an NDA has to be a separate stand-alone written agreement and cannot be incorporated into an underlying written settlement agreement.

Our attorneys have been closely monitoring this issue, and are fully prepared to quickly help employers revise their sexual harassment policies to meet the October 9, 2018 deadline. We are also actively assisting clients to develop sexual harassment training programs.

Visit our Labor & Employment Practice Area to learn more about the legal services we can provide in these areas. If you have any questions or would like more information on the issues discussed in this communication, please contact Robert C. Whitaker, Jr.