

## CLIENT ALERT

### NEW YORK STATE'S & NEW YORK CITY'S MULTI-PRONGED LEGISLATION TO COMBAT SEXUAL HARASSMENT IN THE WORKPLACE

Both New York State and New York City have recently passed laws intended to strengthen anti-sexual harassment policies and combat workplace sexual harassment.

#### NEW YORK STATE'S NEW ANTI-SEXUAL HARASSMENT LEGISLATION

New York State's anti-sexual harassment laws include the following additions to the existing law:

##### **1. Mandatory Written Sexual Harassment Policy and Annual Interactive Training**

Effective October 9, 2018, Employers will be required to provide all employees with written a sexual harassment policy that:

- (i) prohibits sexual harassment and provide examples of prohibited conduct;
- (ii) includes information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment, along with a statement regarding the applicability of local laws prohibiting sexual harassment;
- (iii) includes a standard complaint form;
- (iv) includes a procedure for the timely and confidential investigation of complaints and ensures due process for all parties;
- (v) informs employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- (vi) clearly states that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- (vii) clearly states that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The New York State Department of Labor ("NYDOL") will establish a model sexual harassment policy for employers to adopt or use to establish a similar policy that meets or exceeds the minimum standards of the model policy.

##### **2. Mandatory Annual Interactive Anti-Harassment Training**

Annually, Employers must provide all employees with *interactive* sexual harassment prevention training that meets the following minimum standards:

- (i) an explanation of sexual harassment consistent with guidance issued by the NYDOL in consultation with the NYSDHR;
- (ii) examples of conduct that would constitute unlawful sexual harassment;
- (iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- (v) information addressing conduct by supervisors and any additional responsibilities for supervisors.

The NYDOL will establish a model sexual harassment prevention training program for employers to adopt or use to establish a similar training program that meets or exceeds the minimum standards of the model training.

##### **3. Prohibition of Sexual Harassment Against Non-Employees in the Workplace**

Effective April 12, 2018, New York law was amended to protect contractors, subcontractors, vendors, consultants or others providing services in the workplace

pursuant to a contract from sexual harassment in the workplace. Employers can now be held liable for sexual harassment against such non-employees when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment and failed to take immediate and appropriate corrective action.

#### **4. Prohibition of Mandatory Arbitration Provisions for Resolution of Sexual Harassment Allegations or Claims**

Effective July 11, 2018, New York law will prohibit mandatory arbitration provisions in any contract – whether an employment contract or otherwise – that require the contracting parties to agree to submit claims of sexual harassment to arbitration (instead of the courts). However, in the event that this law’s prohibition conflicts with federal law or a collective bargaining agreement’s provision, the federal law or collective bargaining agreement will control.

#### **5. Prohibition of Non-Disclosure Agreements (“NDAs”) Unless the Condition of Confidentiality Is the Explicit Preference of the Alleged Victim**

Employers often require the inclusion of a non-disclosure provision as part of an agreement to settle claims of sexual harassment; effective July 11, 2018, such provisions may still be enforceable in New York, but only if certain new conditions are met.

Only if the complainant so chooses will the resolution of a claim of sexual harassment include a term or condition preventing disclosure of the underlying facts and circumstances of the claim. To ensure that the complainant is afforded sufficient opportunity to consider the effect of agreeing to non-disclosure, the complainant must be provided 21 days to review the proposed term or condition of confidentiality. Following the execution of the agreement, the complainant is afforded an additional 7-day period to further consider the agreement, and possibly revoke it, such that the agreement only becomes enforceable after the 7-day period has expired and the complainant has not revoked the agreement.

### **NYC’S NEW ANTI-SEXUAL HARASSMENT LEGISLATION**

New York City’s anti-sexual harassment laws include the following additions:

#### **1. Express Inclusion of Workplace Sexual Harassment as a Form of Discrimination under the New York City Human Rights Law**

Effective May 9, 2018, the New York City Human Rights Law was amended to expressly prohibit gender-based harassment.

#### **2. Expansion of Sexual Harassment Protections to All Employers, Regardless of the Number of Employees**

Effective May 9, 2018, in an action for unlawful discriminatory practice based on a claim of gender-based workplace harassment, the NYCHRL’s definition of “employer” is amended to include “any employer, including those with fewer than four persons in their employ.” Previously, an employer could only be liable if it had at least four (4) employed persons.

#### **3. Extension of the Statute of Limitations for Claims of Gender-Based Harassment**

Effective May 9, 2018, a claim of gender-based harassment will carry a statute of limitations of 3 years after the alleged harassment occurred. Previously there was a one-year statute of limitations.

#### **4. Anti-Sexual Harassment Rights and Responsibilities Poster And Info Sheet**

Effective September 6, 2018, employers will be required to conspicuously display an anti-sexual harassment rights and responsibilities poster (in English and in Spanish, at a minimum) where other workplace posters are displayed. Employers will also be required to distribute an information sheet to each employee at the time of hire that may be included in an employer’s employee handbook (does not have to be a separate distribution).

#### **5. Mandating Anti-Sexual Harassment Training for Private Employers**

Effective April 1, 2019, all private employers with 15 or more employees must conduct annual anti-sexual harassment training for all employees. Like the new anti-harassment training NYS requires, NYC training must be *interactive* and annual.

New York City’s training must include such things as:

- An explanation of sexual harassment as a form of unlawful discrimination under the NYCHRL, as well as state and federal law;
- The internal and external complaint processes available to employees;
- The NYCHRL’s prohibition of retaliation; and
- Guidance regarding bystander intervention.

The New York City Commission on Human Rights is tasked with creating an online interactive training module to be posted on their website for access by employers.

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In preparation for these new requirements, employers will need to make sure their posters, policies and trainings are in compliance with the new models once they are published. As always, we will endeavor to keep you apprised of developments as they become known.

If you have questions or would like additional information, please contact EGS's Employment Law Practice Group Leader, Amanda M. Fugazy at [afugazy@egsllp.com](mailto:afugazy@egsllp.com) or the primary EGS attorney with whom you work.

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