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New York State and City Pass Historic Requirements for Sexual Harassment Training and Policies:

What Employers Need to Know to Comply

New York State and New York City recently passed historic legislation requiring most private employers in New York to conduct annual sexual harassment training for all employees, effective October 9, 2018 (under state law) and April 1, 2019 (under city law). The legislation also includes expansion of existing protections against sexual harassment and additional requirements for different types of employers.

Employers should not delay in implementing programs and training to ensure compliance and give careful consideration to both laws, given their significant overlap.

New York State Requirements for Sexual Harassment Policies

The state requirements include adoption of a compliant sexual harassment prevention policy by all employers by October 9, 2018. The policies must include:

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 local laws;
4. a standard complaint form;
5. the procedure for the timely and confidential investigation of complaints;
6. a statement informing employees of their rights of redress and all 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.

New York State Requirements for Sexual Harassment Training

The state also requires all employers to implement sexual harassment training by October 9, 2018 that is interactive and contains at a minimum:

1. an explanation of what constitutes sexual harassment;
2. examples of conduct constituting unlawful harassment;
3. information on state and federal laws concerning sexual harassment and remedies available to victims; and
4. information on employees' rights and available forums for adjudicating complaints administratively and judicially.

Additional Changes to New York State Law

Effective July 11, 2018, the state law prohibits mandatory nondisclosure agreements in sexual harassment claim settlements and agreements, unless the provision of confidentiality is the preference of the complainant. Such clauses are defined as those that would “prevent the disclosure of the underlying facts and circumstances” for a claim involving sexual harassment. Complainants will be given 21 days to consider the confidentiality provision, at which point, if the Complainant prefers to keep the confidentiality provision in the settlement agreement, it must be provided to and agreed upon by all parties. At that point, the person complaining of sexual harassment would have 7 days to revoke the settlement agreement.

Employers must also re-examine their arbitration clauses inasmuch as the law purports to prohibit employers from requiring employees to sign contracts that mandate arbitration for sexual harassment claims. However, it should be noted that it is still unclear whether this requirement would be preempted by the Federal Arbitration Act.

Further, effective January 1, 2019, contractors should take note that all state contracts which require competitive bidding must contain a statement affirming that the bidder has implemented a written sexual harassment prevention policy and provides annual training to all employees.

Application of Sexual Harassment Laws to Non-Employees

The new law has also expanded the reach of existing protections against sexual harassment under the New York State Human Rights Law (“NYSHRL”) to all employees and certain non-employees, such as contractors, subcontractors, vendors, consultants, or service providers who work in its workplace. This modification may mean that an employer or a general contractor could be exposed to liability under NYSHRL if it knew or should have known that the non-employee was being subjected to sexual harassment in its workplace and failed to take immediate and appropriate corrective action. Failure to take appropriate corrective action could subject the company to liability when using subcontractors or other third party service-providers.

Unfortunately, the law does not indicate whether the training requirement is extended to such non-employees. At a minimum, employers should ensure that their sexual harassment policies apply to non-employees working in the employer’s workplace and that the non-employees are aware of these policies. In the coming months, the state will be issuing additional guidance regarding compliance with these new laws.

New York City's New Legal Requirements

New York City's sweeping legislation package included an expansion of the NYCHRL to cover employers with fewer than four employees where sexual harassment is alleged. Additionally, the legislation extends the statute of limitations from one to three years for gender-based harassment claims before the New York City Commission on Human Rights ("NYCCHR").

Effective July 8, 2018, all city contractors who are currently required to file employment reports with the Department of Labor Services will also be report on their practices, policies, and procedures "relating to preventing and addressing sexual harassment".

Effective September 6, 2018, employers in New York City will also be required to conspicuously display an anti-sexual harassment rights and responsibilities poster and provide an information sheet on sexual harassment to new hires. These forms will be made available by the NYCCHR in the near future.

New York City's New Training Requirements

Under the New York City law, all employers in New York City with 15 or more employees (including interns) must conduct sexual harassment training for all employees (who work more than 80 hours per calendar year). Other related requirements include:

1. The training must take place within 90 days of hire and annually thereafter.
2. Employers must also keep records of training for at least three years, including signed employee acknowledgement of such training.
3. The training must be "interactive" – specifically stating that "the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the [NYCCHR]". However, the training does not necessarily need to be "live" or "in-person".

The content of the training is extensive, and must include the following:

1. an explanation of sexual harassment as a form of unlawful discrimination under local law;
2. a statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
3. a description of what sexual harassment is, using examples;
4. any internal complaint process available to employees through their employer to address sexual harassment claims;
5. the complaint process available through the commission, the division of human rights and the United States equal employment opportunity commission, including contact information;
6. the prohibition of retaliation and examples of retaliatory conduct;

7. information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
8. the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

Please also note that, under New York City law, an employee who has received anti-sexual harassment training at one employer within the required training cycle shall not be required to receive additional anti-sexual harassment training at another employer until the next cycle.

How can employers in New York State and New York City comply with the new requirements?

Many of the city training requirements mirror the state requirements; therefore, it is advisable for any employers who do business in or provide services within the five boroughs to consider the city requirements in implementing sexual harassment policies and training materials to comply with the earlier state requirements. Additionally, as the state requires annual training and the city requires annual training plus new hire training, employers should examine when they perform the bulk of their hiring and the timing of their new hire orientations in order to efficiently and effectively train all new hires and ensure that all employees receive training. This may be achieved in a number of ways, including on a quarterly basis, to ensure that all new hires are trained within the required time period and to stagger employee trainings for large workplaces.

Further, employers must evaluate their existing policies, training programs, and contracts with service providers (including the training and policies provided to subcontractors and service providers in the workplace). If the employer uses a standard settlement agreement, the employer should examine it to determine if it violates the bar on non-disclosure agreements. Further, employers should examine any employment agreements, contracts, and/or offer letters for potential mandatory arbitration clauses.

As mentioned above, the state and city will be issuing further guidance over the coming months which should clarify many of the uncertainties highlighted above. As these laws are new, the state and city will be working out the finer details within the broader guidelines set forth in the laws. However, despite these uncertainties, it is very important to be cognizant of these changes and be proactive about ensuring that all policies, procedures, and standard forms are updated accordingly and that training programs are put into place.

As always, if you have any question regarding compliance with these new laws or training, please feel free to contact Peckar & Abramson's employment practices group.

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