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Client Alert

New York State and New York City Pass New Sexual Harassment Laws

April 23, 2018 – The New York State Legislature and the New York City Council have each recently passed new legislation aimed at addressing and preventing sexual harassment and sex discrimination in the workplace. New York employers should take immediate steps to review the new requirements created by this legislation, ensure that they comprehend the changes made to existing law and prepare to comply with them in the coming months. A summary of these changes follows:

Mandatory Arbitration of Sexual Harassment Claims is Now Void Under New York State Law

Effective July 11, 2018, agreements which require employees to submit sexual harassment claims to mandatory binding arbitration will no longer be enforceable and are rendered void. This provision is not retroactive. It also provides an exception for employers and employees subject to collective bargaining agreements which provide for dispute resolution through arbitration. It should be noted, however, that the United States Supreme Court has often held that state laws such as this are preempted by the Federal Arbitration Act (FAA), and thus it is expected that this specific provision of the law will be challenged by defense lawyers seeking to uphold their employer clients' right to enforce arbitration of such claims.

Employer-Mandated Non-Disclosure Provisions in Sexual Harassment Settlements Prohibited Under New York State Law

Also beginning on July 11, 2018, New York state law will prohibit non-disclosure provisions in sexual harassment settlements, unless the complaining party opts for confidentiality, and such individual is provided at least 21 days to consider and 7 days after execution to revoke acceptance of the agreement. These latter protections track those currently afforded employees over 40 who are waiving rights to claim age discrimination under the Older Workers Benefit Protection Act of 1990 (OWBPA).

Mandatory Sexual Harassment Policy and Training Under New York State Law

By October 9, 2018, New York employers will be required on an annual basis to either: (i) adopt and distribute a model sexual harassment policy, jointly and currently being drafted by the New York Department of Labor (NYSDOL) and the New York State Division of Human Rights

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(NYSDHR); or (ii) draft and distribute the employer's own written policies that are compliant with the pending model's prerequisite standards outlined below:

- Prohibition of sexual harassment and examples of prohibited conduct, including a statement that sexual harassment is a form of employee misconduct subject to discipline and/or termination for those who commit it and those who condone or allow it to continue within the workplace;
- Detailed information concerning federal, state, and local laws and available remedies, including employees' external rights of redress and available administrative and judicial forums;
- Standard internal complaint forms and procedures for timely/confidential investigation of sexual harassment complaints; and
- Explicit policy prohibiting retaliation for registering a complaint or cooperating in connection with the employer's investigation thereof.

On that same date, New York employers will required, as well, to implement annual, "interactive" sexual harassment training, a model for which will also be drafted for employers by NYSDOL and NYSDHR. The employer can, alternatively, choose to implement its own sexual harassment training programs that comply with the prerequisite standard model outlined below:

- Providing an explanation of sexual harassment and specific examples of inappropriate conduct;
- Providing detailed information concerning federal, state, and local laws and appropriate available remedies, as well as employees' external rights of redress and available administrative and judicial forums; and
- Providing in-person training to comply with the "interactive" requirement. The law makes clear that computer-based training, by itself, is no longer acceptable.

In addition, employers must develop and make available a standard internal complaint form which employees may use to report claims of sexual harassment. The complaint form must also inform employees in writing of "all available forums for adjudicating sexual harassment complaints administratively and judicially."

Expansion of New York State Human Rights Law

Effective immediately, the New York State Human Rights law is extended to cover non-employees such as independent contractors and vendors (as perpetrators of sexual harassment). Employer liability for sexual harassment committed by these non-employees may thus exist where the employer knew or should have known that the harassment was occurring and failed to take immediate and appropriate remedial steps to stop it.

How New York Employers Should Prepare for These New Laws

As an initial matter, it is worth noting that agreements mandating arbitration of sexual harassment claims that were entered into before July 11, 2018 will not be void. However, for agreements beginning on or after July 11, 2018, employers should be fully aware that including such provisions will be deemed void and in violation of the law (unless a court determines that this specific provision is preempted by the FAA, which is uncertain at this time). As such, employers should immediately consider updating any agreements, policies or manuals that

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include mandatory arbitration provisions governing sexual harassment and distribute those, as necessary, prior to the July 11 deadline.

For any confidential settlement agreements relating to sexual harassment, employers should get written consent from the complaining party – separate and apart from the actual settlement agreement – that confirms that the individual voluntarily agrees to keep the settlement confidential, and then provide those individuals with at least 21 days for them to consider the agreement and 7 days for them to revoke it (regardless of the complainant's age). Employers should thus consider revising any template separation and/or settlement agreements they have previously utilized prior to the date the new law becomes effective.

With respect to sexual harassment policies, employers should, at a minimum, keep current and look out for the release of the State's model sexual harassment policy. We would, however, advise employers to immediately begin updating their current sexual harassment policies with legal counsel to ensure that they comply with the new law's minimum requirements outlined above. Employers should also immediately review and revise their current sexual harassment policies to ensure that they extend to "non-employees," most notably independent contractors and vendors. Employers must ensure that all of these policies are updated in writing prior to the July 11 deadline.

As for sexual harassment training, especially for those employers previously using computer-based programs, we advise that employers begin developing interactive programs that comply with the new law's minimum requirements and monitor for the release of the State's model training guidelines. In an effort to meet prospective legal obligations, it is suggested that employment counsel or a human resources professional be consulted to provide appropriate and compliant sexual harassment training materials prior to the October 9, 2018 deadline.

Special Note to New York City Employers

In addition to the above requirements under New York State law, New York City employers with 15 or more employees must, commencing on April 1, 2019, also provide sexual harassment training to new employees within the first 90 days of hire. New York City employers must also continue to provide interactive training to all employees on an annualized basis. The minimum requirements of this training include:

- Providing a thorough explanation that sexual harassment is a form of discrimination under federal, state, and local law and will not be tolerated;
- Providing explicit examples of sexual harassment and information on the internal complaint process and reporting procedures;
- Providing express information regarding complaint processes afforded by New York City Commission on Human Rights (NYCCHR) and Equal Employment Opportunity Commission (EEOC), including providing contact information for these agencies;
- Providing an express statement of the employer's anti-retaliation policies with specific examples; and
- Providing managers with specific responsibilities for preventing sexual harassment and retaliation.

New York City employers must also keep accurate and timely records of sexual harassment training for at least three years along with a signed acknowledgement of attendance form (which may be maintained by the employer electronically). New York City employers must further

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display an anti-sexual harassment poster and provide an information sheet to new employees upon hire (a copy of which will be posted on the NYCCHR website). Finally, the New York City Human Rights Law, as it pertains to sexual harassment, now applies to all employers regardless of size (*i.e.*, not just those with 4 or more employees), so all New York City employers should familiarize themselves with these anti-discrimination laws accordingly.

If you require any additional information concerning New York State or New York City sexual harassment legislation, or about any other employment-related issues, please contact:

Jeffrey P. Englander
(212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
(212) 735-8736
kmarkel@morrisoncohen.com

Christopher W. Pendleton
(212) 735-8783
cpendleton@morrisoncohen.com

Basil C. Sitaras
(212) 735-8849
bsitaras@morrisoncohen.com

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