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#MeToo prompts proposed changes to New York's harassment laws

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The sexual harassment scandal involving entertainment executive Harvey Weinstein, has had more significant, and now legal, effects than just the creation and proliferation of the #METOO hashtag. Indeed, significant changes are and/or are expected to be signed into law which effectively amend the New York State Human Rights Law (New York Executive Law, Section 296 et seq.) ("NYSHRL") and the and New York City Human Rights Law (NYC Admin Code Section 8-106 et seq.) (" NYCHRL").

The NYSHRL and the NYCRL have largely mirrored the Federal Anti-Discrimination laws (for example, Title VII of the Civil Rights Act of 1964), with regards to the burdens of proof needed to establish a viable harassment claim (whether sexual or otherwise). Harassment must be "severe and pervasive" to be actionable, and generally, employers have broad discretion in fashioning their policies (if they choose to have them, although it is always recommended), running their organizations and reaching and executing settlement. The new legislation does not now leave employers to their own devices, but it expands the breadth of those laws and the obligations of employers.1

1 A few other states have enacted laws which require stricter requirements and obligations for employers, such as Maine, Connecticut and California.

N.Y. CITY EMPLOYERS

The New York City Council passed the Stop Sexual Harassment in New York City Act (which consists of 11 separate bills) on April 11, 2018 (the "Act"). Awaiting Mayor de Blasio's signature, the Act (which would go into effect on April 1, 2019) would require employers with 15 or more employees to conduct annual "interactive" sexual harassment training for all employees (managerial, supervisory and line-level). Although such training has always been part of best-practice recommendations for employers, the new law would mandate training in a rather extensive list of topics including sexual harassment, bystander intervention, anti-retaliation policies, supervisor responsibilities, and internal and external complaints. Employers would be required to provide training after 90 days of initial hire (subject to any prior training that an employee may have received from a prior employer during a training cycle), sign acknowledgements of attendance which are to be maintained by the employer for 3 years, and require the NYC Commission on Human Rights, which administers the NYCHRL, to promulgate and provide sample training modules for employer use.

Currently, the NYCHRL applies to employers with 4 employees or more, but the Act would expand the reach of the NYCHRL for sexual harassment to all employers regardless of size, as well as extend the statute of limitations period for filing a claim with the New York City Human Rights Commission from one year to three years. While this expansion coincides with the fact that the right to file a Complaint in State Court has always been 3 years, it is still significant given the fact that limitation for filing a claim of harassment or discrimination with the federal Equal Employment Opportunity Commission against New York employers is only 300 days.

The Act would also create a new anti-sexual harassment rights and responsibilities poster which would be required to be displayed in a conspicuous location (like many other posting requirements), as well as require employers to provide new hires with an information sheet regarding sexual harassment (of which the failure to do so would compel penalties of $250 or more).

The Act would also specifically amend the policy statement of the NYCHRL to include sexual harassment as a specific form of discrimination, rather than the current status in which sexual harassment generally falls into the category of discrimination based upon sex.

Additional mandates would be required for City workers, as well as various reporting requirements for city agencies.

NEW YORK EMPLOYERS

Governor Cuomo's Budget Bill, which was signed on April 12, 2018, similarly contains various mandates for New York State employers (not just New York City employers) in relation to sexual harassment. Under the New York State mandates, employers must implement a policy on sexual harassment by October 7, 2018. Such policies must include prohibitions of sexual harassment as well as examples of prohibited conduct and sample "complaint" forms. The New York State Department of Labor ("NYSDOL") was also, charged, however, with creating and providing access to model sexual harassment policies. Employers must be prepared to distribute a complaint policy by October 9, 2018. In that same vein, the NYSDOL and the New York State Division of Human Rights (" NYDHR") are also charged with creating interactive sexual harassment trainings which can be used by New York employers. Alternatively, employers may create their own trainings that detail what sexual harassment is, provide examples of unlawful conduct, detail the state and federal laws and remedies available to employees, discuss the responsibilities of supervisors in addressing and preventing sexual harassment, and provide details as to where complaints can be made. Like the Act, the Bill also requires New York State employers to provide annual trainings to all employees including supervisors/managers. This portion of the Bill will take effect as of October 9, 2018.

The Bill also further expands employer's potential liability by covering claims for sexual harassment made by "non-employees" such as independent contracts, consultants, vendors or suppliers. Traditionally, the anti-discrimination laws under federal, state and city law have not generally afforded rights and remedies to individuals other than employees, so this change would effectively give rights to an entire class of individuals who previously had no recourse for actions that rise to the level of sexual harassment. Notably, employer liability for such sexual harassment will be on a "known or should have known" basis, and upon the failure to take remedial action after being notified of an issue. This portion of the Bill takes effect immediately.

The Bill would similarly impose restrictions on where and how employers could resolve claims of sexual harassment. Currently, settlement agreements between employers and employees often (if not universally) contain confidentiality provisions precluding the parties to the agreement from discussing the terms of the settlement or in many instances, the facts underlying the settlement. Under the terms of the Bill, prohibitions of disclosure regarding the underlying facts would be unlawful unless the victim so requests, although confidentiality regarding the terms of an agreement would not be barred as a settlement term. Notably, the law would also mirror execution guidelines found as part of the Older Workers Benefit Protection Act, requiring a minimum 21-day consideration period before execution of a release, and a 7-day revocation period after such execution. These portions of the Bill will take effect as of July 11, 2018.

The new mandate would also amend the New York Civil Practice Laws and Rules by banning mandatory arbitration clauses for sexual harassment claims. This portion of the Bill will take effect as of July 11, 2018. However, this provision may be in conflict with the Federal Arbitration Act which, and may ultimately be deemed unlawful.

RECOMMENDATIONS

Employers should review their current sexual harassment policies and make any necessary amendments to ensure timely compliance with the new requirements (whether under New York State law, New York City law, or both), as well as a role out of these new policies to ensure acknowledgment and receipt by employees. Additionally, any standard forms, such as arbitration agreements, separation/severance agreements, and/or internal complaint forms used by employers should be reviewed by counsel and modified to reflect the changes in the law. Employers who have not previously provided sexual harassment training to their employees should research training options that work best for their organization. Employers must ensure that such training is "interactive." For those who have provided training as a matter of course for their organizations, we recommend they review current training modules to ensure that the topics covered meet the new requirements.

If you would like assistance in ensuring that your organization is or will be compliant, please contact your Withers attorney, or Brooke Schneider (Brooke.Schneider@withersworldwide.com).

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