

LABOR AND EMPLOYMENT

NEW YORK IMPOSES NEW REQUIREMENTS TO COMBAT SEXUAL HARASSMENT

On April 12, 2018, New York Governor Andrew Cuomo signed the New York State Budget into law. In response to media coverage of sexual harassment claims and the #MeToo movement, the Budget contains new legislative requirements directed at employers intended to address workplace sexual harassment.

- Effective Immediately
 - The New York State Human Rights Law was amended to prohibit harassment of “non-employees” in the workplace.
 - Non-employees include contractors, subcontractors, vendors, consultants, or others providing services pursuant to a contract.
 - Employers may be liable if the employer knew, or should have known, about the harassment and failed to take “immediate and appropriate corrective action.”
 - **Recommendation:** Employers should consider: updating their anti-harassment policies to include protections for non-employees; educating employees on the prohibition against harassment of non-employees; and encouraging employees to report any inappropriate conduct.
- Effective July 11, 2018
 - The New York Civil Practice Law and Rules was amended to prohibit mandatory arbitration of sexual harassment claims.
 - The prohibited clause is null and void, but the remaining provisions in an arbitration agreement remain enforceable.
 - If a collective bargaining agreement requires mandatory arbitration of sexual harassment claims, the terms of the collective bargaining agreement prevail.
 - However, it is unclear whether this new arbitration prohibition will ultimately be enforceable as the United States Supreme Court has routinely held that state laws that expressly identify a category of claims that cannot be arbitrated (in this case, sexual harassment claims) are preempted by the Federal Arbitration Act (FAA).
 - **Recommendation:** Employers should consult with their legal counsel to determine whether their arbitration agreements should be modified, and continue to monitor the legal developments regarding enforcement of this provision in light of the Supreme Court’s interpretation of the FAA.
- Effective July 11, 2018
 - Confidentiality/non-disclosure clauses related to any settlement, agreement, or other resolution of a sexual harassment claim are prohibited unless it is the Complainant’s preference.
 - Confidentiality/non-disclosure clauses can be included in an agreement provided that the Complainant has 21 days to review and, if approved, 7 days to revoke.

- **Recommendation:** Employers should amend any settlement forms and release agreements to ensure compliance with the new confidentiality/non-disclosure requirements.
- Effective October 9, 2018
 - The New York State Department of Labor and Division of Human Rights are required to create and publish a model sexual harassment prevention guidance document, sexual harassment prevention policy, and model sexual harassment prevention training program.
 - Employers must adopt the model policy or ensure their own policy complies with the model's standards.
 - The policy must:
 - prohibit sexual harassment consistent with guidance from the Department of Labor and the Division of Human Rights, and provide examples of prohibited conduct;
 - provide information on state and federal laws concerning sexual harassment and the remedies available to victims;
 - include a standard complaint form;
 - include a procedure for a timely and confidential investigation of complaints that ensures due process for all parties;
 - inform employees of their rights and all available forums for adjudicating complaints administratively and judicially;
 - state 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
 - indicate that retaliation against individuals who complain of sexual harassment or those who testify or assist in any legal proceeding is unlawful.
 - Employers must also adopt the model training program or present a training program that complies with the model.
 - The training must be interactive, conducted annually, and include:
 - an explanation of sexual harassment and examples of prohibited conduct;
 - information on state and federal laws concerning sexual harassment and remedies available to victims;
 - a section addressing conduct by supervisors and additional responsibilities for such supervisors; and
 - information on employees' rights and all available forums for adjudicating complaints administratively and judicially.

- **Recommendation:** Employers should either adopt the State’s model policies and training or review their existing anti-harassment policies and training to ensure compliance with the new standards.
- Effective January 1, 2019
- The New York State Finance Law was amended to include new requirements for bids on New York State contracts.
 - Where competitive bidding for state contracts is required, bids must include the following representation that the bidding entity has implemented a written policy addressing sexual harassment in the workplace and that it provides annual sexual harassment preventing training to all employees.

“By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that the bidder has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of section two hundred one-g of the labor law.”
 - Bids that do not contain the representation will not be considered, unless the bidder submits a signed statement explaining why it cannot make the representation.
 - **Recommendation:** Employers bidding on state contracts should ensure their policies and training programs comply with the new requirements. Any new bids should contain the required representation or a signed statement setting forth the reasons why the representation cannot be made.

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