

Publications

Labor and Employment Alert: New York Enacts Sweeping Sexual Harassment Legislation

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On April 12, 2018, New York Governor Andrew Cuomo signed the state's 2018-2019 budget bill, which includes sweeping changes to the state's sexual harassment law. The law requires state contractor bids to contain a certification concerning sexual harassment; generally prohibits mandatory arbitration and nondisclosure agreements in sexual harassment cases; establishes model sexual harassment policy and training requirements; and expands the protections against sexual harassment to non-employees.

Mandatory arbitration clauses are prohibited (*effective in 90 days*)

Except where inconsistent with federal law, a written contract may not contain a "prohibited clause." A "prohibited clause" is any provision requiring that the parties submit to mandatory arbitration any allegation or claim of an unlawful discriminatory practice of sexual harassment. Such a provision is null and void, but does not impair the enforceability of any other provision of the contract. An employer may incorporate a non-prohibited clause or other mandatory arbitration provision within a contract that the parties agree upon. Additionally, collective bargaining agreement's requirements prevail over these requirements.

Nondisclosure agreements are prohibited (*effective in 90 days*)

Employers are prohibited from including in any settlement agreement or other resolution of a claim involving sexual harassment any term that would prevent disclosing the underlying facts and circumstances to the claim or action, unless the condition of confidentiality is the complainant's preference. Employers are likewise prohibited from including a similar nondisclosure provision in an agreed judgment, stipulation, decree, or settlement agreement in a legal proceeding.

A nondisclosure provision must be provided to all parties for consideration, and the individual then has 21 days to consider it. If after 21 days the individual agrees to the nondisclosure provision, the provision must be included in a signed, written agreement. The individual then has an additional 7 days in which to revoke the agreement. The agreement does not become effective until after this revocation period.

State-prescribed model harassment policy and training (*effective in 180 days*)

The state will create and publish a model sexual harassment prevention guidance document and policy for employers to use in adopting the newly required sexual harassment policy. Every employer must adopt either the model policy or its own policy that equals or exceeds the model's minimum standards. The policy must be provided to all employees in writing.

The model sexual harassment prevention policy (and any employer policy) must:

- prohibit sexual harassment and provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state laws concerning sexual harassment and remedies available and a statement that there may be applicable local laws;
- include a standard complaint form;
- include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly 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
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The state will also create a model sexual harassment prevention training program. The program will be interactive and include: an explanation of sexual harassment; examples of conduct that would constitute unlawful sexual harassment; information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; information concerning employees' rights of redress and all available forums for adjudicating complaint; and information concerning conduct by and responsibilities of supervisors. Every employer must use the model program or establish a similar one that equals or exceeds the model's minimum standards. The training must be provided to **all** employees annually.

Harassment of non-employees is prohibited (*effective immediately*)

It is now an unlawful discriminatory practice for an employer to permit sexual harassment of contractors, subcontractors, vendors, consultants, or other persons providing services pursuant to a contract (or one of their employees). An employer may be liable for sexual harassment when it knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace, and the

employer failed to take immediate and appropriate corrective action. The extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser must be considered in assessing liability.

Prevention of sexual harassment by state contractors *(effective January 1, 2019)*

Bidders on state contracts must include a certification that the bidder has implemented a written sexual harassment policy and that it provides annual sexual harassment training to all of its employees. The bid generally will not be considered if it does not contain this certification.

Conclusion

New York now joins California, Connecticut and Maine in mandating sexual harassment training. Employers in New York should review their settlement agreements in sexual harassment cases and take note of mandatory arbitration and non-disclosure provisions. Employers will also need to review their sexual harassment policies and training to ensure they comply with the state's forthcoming model policy and training program. Contact your Vorys lawyer if you have questions about sexual harassment policies, prevention, or training.