BAILEY DUQUETTE

EMPLOYMENT LAW ALERT

OCTOBER 9, 2018 IS THE DEADLINE FOR NEW YORK STATE EMPLOYERS TO ADOPT POLICIES PROHIBITING SEXUAL HARASSMENT AND TO ADOPT ANNUAL SEXUAL HARASSMENT TRAINING; NEW YORK CITY DEADLINES ARE ALSO APPROACHING

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In April 2018, New York State amended the New York Human Rights Law ("NYHRL") in an effort to bolster and expand sexual harassment and sexual discrimination protections for workers across the State. New York City followed suit in May 2018, passing the Stop Sexual Harassment in NYC Act (the "NYC Act") into law.

Both the New York State and City legislation were passed in the wake of the #MeToo and #TimesUp movements, as well as high profile allegations of sexual harassment in the workplace.

We are issuing this Alert because New York State employers are required by **October 9, 2018** to: (1) either adopt policies prohibiting sexual harassment that New York State agencies have promulgated or have their own policies in place that meet or exceed those standards; and (2) adopt annual sexual harassment training for all their employees.

I. The State's Requirements For An Effective Sexual Harassment Policy

The New York Department of Labor ("NYSDOL") and New York State Division of Human Rights ("NYSDHR") have recently released draft models for sexual harassment prevention training, complaint forms and policies.[i] The draft models further delineate the standards for any such implementation.

In its current iteration, the promulgated standard sexual harassment policy ("Draft Policy") is intended to make both employers and employees cognizant of their respective rights, duties, liabilities and protections under New York's anti-sexual harassment framework. In particular, the Draft Policy provides and calls for:

- A statement identifying which persons the policy shall apply to;
- A definition for and examples of sexual harassment;
- A declaration that sexual harassment will not be tolerated;
- The implementation of a reporting mechanism for any violations;
- The prohibition of any retaliation (i.e., any adverse employment actions) in connection with the reporting of a violation;
- A prompt and comprehensive investigation to be conducted into allegations of sexual harassment;
- That corrective action be taken when an act of sexual harassment occurs; and
- That victims of sexual harassment are informed of available remedies and resources.

Alternatively, the employer is permitted to adopt its own policies. If the employer does so, however, its implemented policies must meet or exceed the minimum standards set forth in the Draft Policy.

II. The State's Requirements For Effective Sexual Harassment Prevention Training

Employers also must effectuate sexual harassment prevention training. While New York State's draft Model Sexual Harassment Prevention Training ("Draft Training") can be used as is, the employer is again permitted to implement its own training formats, so long as they meet or exceed the State's requirements. This is designed to present employers with flexibility across differing workplaces while maintaining core training standards. Among the core training standards that must be addressed in the sexual harassment prevention training are:

- Examples of unlawful sexual harassment;
- Reporting procedures and mechanisms, including contact information for names or offices with which employees should file complaints;
- Federal, state and local provisions concerning sexual harassment and available remedies and resources for victims; and
- The responsibilities and conduct of supervisors to appropriately address sexual harassment claims.

The New York State law requires that any implemented training programs must be "interactive" in order to meet the State's sexual harassment training standards. This interactive sexual harassment prevention training must be in place by October 9, 2018, but employers will have until January 1, 2019 to conduct the trainings and ensure that all employees participate. Additional trainings will be required annually thereafter.

III. Additional Requirements For Employers Who Are Also Covered By The NYC Act

For all employers within New York City, several provisions took effect immediately. These include the extension of the statute of limitations for sexual harassment claims from one to three years and the specific designation of sexual harassment as discrimination under the New York City Human Rights Law ("NYCHRL"). The NYC Act also required employers to conspicuously post a Stop Sexual Harassment Act Notice ("Notice") in the workplace by September 6, 2018.

Furthermore, by April 1, 2019, the NYC Act will require employers to provide interactive anti-sexual harassment training information to employees, including interns, within 90 days of hiring.[ii]

In addition to those areas of training required by the State's Draft Training model, the NYC Act further requires that the anti-sexual harassment training cover:

- The complaint process available through the New York City Commission on Human Rights ("NYCCHR") and Equal Employment Opportunity Commission ("EEOC"), including agency contact information;
- The employer's anti-retaliation policies; and
- An explanation that sexual harassment is discrimination under applicable federal, state and city law.

Employers in New York City must keep records of sexual harassment trainings with signed acknowledgment of attendance forms for a minimum of three years.

IV. Additional Important Information

The New York State and City legislations contain numerous other important modifications to how sexual harassment claims are brought under state and city law.

Among other things, New York State expanded the categories of individuals who may seek relief for sexual harassment claims. Non-employees (including vendors, consultants, independent contractors, and even applicants for employment) may now bring claims of sexual harassment against employers who fail to properly take timely and appropriate action where the employer knew or should have known that the non-employee was a victim of workplace sexual harassment.

New York State is also restricting the use of non-disclosure provisions in settlement agreements for sexual harassment matters. Employers are no longer able to mandate non-disclosure agreements as part of any settlement arising out of workplace sexual harassment/misconduct. Any inclusion of a non-disclosure provision must be at the employee's preference, and the employee must have 21 days to consider the inclusion of a proposed non-disclosure provision. Additionally, an employee will have seven days to revoke an executed settlement agreement which contains a non-disclosure provision.

The New York State legislation also includes a ban on the mandatory arbitration of sexual harassment claims (this prohibition, however, does not appear to apply to collective bargaining agreements). We have serious doubt as to whether these state anti-arbitration provisions are enforceable when the Federal Arbitration Act is impacted; we instead believe that they will be found to be preempted by federal law. We will continue to monitor this issue accordingly.

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Bailey Duquette P.C. provides legal counsel to both employers and employees. For additional assistance or questions – whether it be counseling or litigation related – with respect to federal, state or city laws concerning sexual harassment and discrimination, including but not limited to the mandatory sexual harassment prevention policies and training requirements detailed in this Employment Law Alert, please contact:

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[i] Final versions of the Model Sexual Harassment Policy, Model Complaint Form, and Model Sexual Harassment Prevention Training are expected to be released shortly after the comment period ends on September 12, 2018.

[ii] New York State's Draft Training model calls for new hires to be provided training within 30 days. Given the discrepancy, employers within New York City should also provide training to new employees within 30 days to ensure compliance with New York State standards.