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New Anti-Sexual Harassment Measures in New York State and New York City

On April 12, 2018, New York Governor Andrew Cuomo signed into law the state's budget for fiscal year 2019, which contains a number of new measures that expand current state anti-sexual harassment protections. Among other things, effective July 11, 2018, employment agreements and other contracts in New York may no longer include mandatory arbitration clauses for sexual harassment claims, and settlements of sexual harassment claims may not include non-disclosure provisions unless the complainant prefers to include such a provision. In addition, effective October 9, 2018, all New York employers must adopt and distribute a sexual harassment prevention policy and conduct annual sexual harassment prevention trainings for all employees.

New York City has now taken a similar path. On May 9, 2018, Mayor Bill de Blasio signed into law the Stop Sexual Harassment in NYC Act (the "Act"), a package of 11 separate bills designed to provide additional protections against sexual harassment in the workplace. The citywide measures include mandatory sexual harassment prevention trainings for all New York City-based employees of employers with 15 or more workers. The Act also extends the statute of limitations for claims alleging gender-based harassment from one to three years, and expands coverage of gender-based harassment claims under the New York City Human Rights Law ("NYCHRL") to all employers, no matter how small. Various provisions of the Act take effect immediately upon its enactment, while other provisions are not effective until 90 days or, in some cases, nearly one year after enactment.

Key New Statewide Anti-Sexual Harassment¹ Measures

- **Prohibition on Mandatory Arbitration Clauses.** The new measures prohibit mandatory arbitration clauses in settlements of sexual harassment claims. Specifically, the law provides that, except where inconsistent with federal law, written contracts entered into on or after July 11, 2018 cannot contain a term or provision that mandates arbitration for allegations or claims of sexual harassment.² In addition, the law makes mandatory arbitration clauses for sexual harassment claims in existing contracts null and void, although the inclusion of such clauses in existing contracts does not "impair the enforceability of any other provision of such contract."³ The law still permits any arbitration clauses for sexual harassment claims that are included as part of a collective bargaining agreement.⁴

It is worth noting that this prohibition may be challenged in court, given the U.S. Supreme Court's recent holding that the Federal Arbitration Act preempts "any state rule discriminating on its face

against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim . . . [and] any rule that covertly accomplishes the same objective by disfavoring contracts that . . . have the defining features of arbitration agreements.”⁵

- **Prohibition on Non-Disclosure Agreements.** The new measures also prohibit non-disclosure agreements whose “factual foundation . . . involve[] sexual harassment.”⁶ Under the new legislation, employers are prohibited from including “any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action” in any settlement, agreement or other resolution of any claim involving sexual harassment (whether or not a lawsuit has been brought), unless the complainant requests confidentiality.⁷ If the complainant does request confidentiality, notice of the non-disclosure term or condition must be provided to all parties, and the complainant has 21 days to consider that term or condition. If the complainant continues to prefer confidentiality after the 21-day period, that preference must be memorialized in an agreement signed by all parties. The complainant then has the option of revoking the agreement for a period of 7 days following its execution, and the agreement does not become effective or enforceable until the revocation period has expired. These provisions take effect on July 11, 2018.
- **Mandatory Sexual Harassment Prevention Policy and Training.** The new measures require the New York State Department of Labor (“DOL”), together with the New York State Division of Human Rights (“SDHR”), to create and publish a model sexual harassment prevention policy and training program.⁸ Employers must have a sexual harassment prevention policy and a training program that equal or exceed the minimum standards provided by the DOL’s model policy and training. The training must be provided on an annual basis to all employees, and all employees must also be provided with a written copy of the sexual harassment prevention policy. This law takes effect on October 9, 2018.

The model sexual harassment policy and, in turn, any employer’s sexual harassment policy, must:

- Prohibit sexual harassment and provide examples of prohibited conduct;
- Include information about any applicable federal or state statutes concerning sexual harassment and any remedies thereof;
- 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;

- Clearly state that sexual harassment is a form of employee misconduct and that sanctions will be enforced accordingly; and
- Clearly state that retaliation is prohibited and unlawful.

As with the model sexual harassment policy, an employer's sexual harassment prevention training program, which must be interactive,⁹ must include:

- An explanation of sexual harassment, and examples of conduct constituting unlawful sexual harassment;
 - Information about any applicable federal or state statutes concerning sexual harassment and any remedies available to victims of sexual harassment; and
 - Information about employees' rights of redress and all available forums for adjudicating complaints.
- **Expansion of Sexual Harassment Protections to Non-Employees.** The new measures extend liability to any employer that "permit[s]" the sexual harassment of "non-employees" in its workplace, when the employer, its agents or supervisors (1) knew or should have known that non-employees were subjected to sexual harassment in the workplace, and (2) failed to take immediate and appropriate corrective action.¹⁰ A non-employee is defined broadly to include a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such an entity.¹¹ This expansion is effective immediately.

Stop Sexual Harassment in NYC Act

The Stop Sexual Harassment in NYC Act imposes the following additional obligations, among others, on New York City employers:

- **Mandatory Employee Sexual Harassment Prevention Trainings.** Under the Act, employers with 15 or more employees are required to conduct annual sexual harassment prevention trainings for all employees employed in New York City.¹² The training is required within 90 days of an employee's initial hire, for any employee who works more than 80 hours in a calendar year on a part-time or full-time basis.¹³ The definition of employee includes supervisory or managerial employees, as well as interns.¹⁴

The Act requires that trainings be interactive, which is defined as "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training

program or other participatory forms of training as determined by the [New York City Commission on Human Rights].”¹⁵ The trainings must include, at a minimum, the following components:

- An explanation of sexual harassment as a form of unlawful discrimination under local law, and also under state and federal law;
- A description of what sexual harassment is, using examples;
- A description of any internal complaint process available to employees through their employer to address sexual harassment claims;
- A description of the complaint process available through the New York City Commission on Human Rights (the “Commission”), the SDHR and the EEOC;
- A statement prohibiting retaliation and examples thereof;
- Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- A description of the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and of measures that such employees may take to appropriately address sexual harassment complaints.¹⁶

Employers are now required to maintain records of all such trainings, including signed employee acknowledgements, for a period of at least three years.¹⁷

With respect to these trainings, the Act requires the Commission to develop an online interactive training module that may be used by employers as an option to satisfy the Act’s requirements, provided that employers inform all employees of any internal processes available to them to address sexual harassment complaints.¹⁸ The Commission’s module will allow for the electronic provision of certification each time the module is accessed and completed, and will be made available publicly at no cost on the Commission’s website. All these requirements will take effect on April 1, 2019.

Notably, employees who have received sexual harassment prevention training at one employer “within the required training cycle” are not required to receive additional sexual harassment prevention training at another employer “until the next cycle.”¹⁹ Also, an employer subject to training requirements in multiple jurisdictions is permitted to provide proof that its existing sexual harassment prevention training is already compliant with the Act’s requirements, provided that the existing training is made available to employees on an annual basis and contains the mandatory elements specified in the Act.

- **Expansion of Statute of Limitations for Gender-Based Harassment.** The Act increases the statute of limitations for filing claims alleging gender-based harassment from one year to three years from the time that the alleged harassment occurred.²⁰ This expansion takes effect immediately.
- **Expansion of Employer Obligations for Sexual Harassment Protection.** The Act expands the NYCHRL to cover gender-based harassment claims against all employers, regardless of the number of employees.²¹ Prior to this expansion, the NYCHRL applied only to employers with four or more employees. This expansion takes effect immediately.
- **Anti-Sexual Harassment Rights and Responsibilities Poster.** The Act requires all employers in New York City to conspicuously display an anti-sexual harassment rights and responsibility poster designed by the Commission in employee breakrooms or other common areas where employees gather.²² This requirement takes effect on September 6, 2018.

Key Takeaways for Employers Going Forward

The new state and city measures will impose greater obligations on employers. Below are some key takeaways.

- **Update policies, training modules, and templates of agreements.** Covered employers may want to consider reviewing their sexual harassment policies and training programs, as well as templates of employment and settlement agreements, and updating or modifying them to ensure compliance with the new requirements. Because state law now extends employer liability to sexual harassment of non-employees, New York employers should consider ensuring that their policies and training programs make clear that sexual harassment of non-employees, as well as employees, is prohibited. Employers in New York City may also want to consider assessing whether policies should be implemented or strengthened to address the responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation.
- **Conduct a review of previous incidents.** Employers subject to the state's expanded sexual harassment protections to non-employees should consider reviewing any complaints previously reported by contractors, subcontractors, vendors or consultants to assess the potential for new litigation risks from these claims.

Employers in New York City should consider reviewing complaints alleging gender-based harassment arising from conduct that occurred within the three years prior to the Act's May 9, 2018 enactment date to assess the potential for new litigation risks resulting from the expansion of the statute of limitations for such claims.

- **Update internal recordkeeping policies.** New York City employers should consider assessing and upgrading internal recordkeeping policies and practices to ensure compliance with the Act's requirement to maintain records of all trainings, including signed employee acknowledgements, for a period of at least three years. New York employers outside of New York City, while not subject to the Act's recordkeeping requirements, should nonetheless consider maintaining records of trainings and policies provided to their employees pursuant to the new state requirements, as a matter of good practice.
- **Review insurance coverage.** Employers may wish to determine whether there is any increased risk from: (1) the expanded coverage of sexual harassment protections to non-employees under the state legislation, (2) the city Act's extension of the statute of limitations for gender-based harassment claims or (3) the NYCHRL's expanded coverage of gender-based harassment claims to all employers. Employers should consider whether such determinations warrant adjustments to existing insurance coverage.
- **Consider overlap in state and city measures.** Employers in New York City will be subject to the training requirements from both the state and city measures. On the whole, the city's requirements appear to be more expansive, and compliance with them should ensure compliance with the state measures. Notably, the city Act requires training on the fairly new concept of "bystander intervention." New York City employers should consider addressing "bystander intervention" both in their anti-sexual harassment policy and in accompanying trainings.

Importantly, expanded anti-sexual harassment legislation is not limited to New York, and many employers could be subject to different legal obligations in different states. For example:

- Washington State has recently enacted a law prohibiting a provision in an employment contract or agreement that requires employees to resolve "claims of discrimination in a dispute resolution process that is confidential."²³
- California,²⁴ New Jersey,²⁵ and Pennsylvania²⁶ have introduced, but not yet enacted, legislation prohibiting non-disclosure provisions that prevent the disclosure of information underlying a sexual harassment claim. California has also introduced prohibitions that prevent employers from requiring employees to sign non-disparagement agreements or other documents that deny employees the right to disclose information about unlawful acts in the workplace.²⁷
- The Connecticut House of Representatives is considering a bill that requires employers with 20 or more employees to provide sexual harassment prevention training.²⁸ Under current Connecticut law, only employees with 50 or more employees are required to provide such trainings, and only to supervisory employees.

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- Like New York’s prohibition on mandatory arbitration agreements, the Disclosing Sexual Harassment in the Workplace Act of 2018, passed by the Maryland General Assembly, would prohibit employers from requiring employees to enter into agreements that waive any “substantive or procedural right or remedy” to a claim of sexual harassment, or retaliation for reporting a right or remedy based on sexual harassment, that accrues in the future.²⁹ The Maryland legislation has yet to be signed into law by Governor Larry Hogan. Similarly, South Carolina’s legislature is considering a bill to prohibit an arbitration agreement that “requires arbitration of a sex discrimination dispute.”³⁰

Employers that operate in multiple states are encouraged to continue monitoring ongoing developments in those states in order to ensure compliance with new obligations.

The state budget can be found [here](#). The constituent bills of the Stop Sexual Harassment in NYC Act can be found here: [2018/092](#), [2018/093](#), [2018/094](#), [2018/095](#), [2018/096](#), [2018/097](#), [2018/098](#), [2018/099](#), [2018/100](#), [2018/101](#) and [2018/102](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ While “sexual harassment” is currently not defined under New York State or City law, guidance issued by the New York State Division of Human Rights defines the term as involving “words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual’s sex” or “any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, or which interfere with the recipient’s job performance.”

This definition is substantively similar to that used by the United States Equal Employment Opportunity Commission (“EEOC”). The EEOC’s definition, which was endorsed by the U.S. Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986), provides that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a). The EEOC’s definition has been substantially adopted in guidance issued by the New York City Commission on Human Rights, as well as in recent legislation combatting sexual harassment in the workplace passed by the New York State Senate. That legislation, Senate Bill S7848A, has yet to pass the New York State Assembly.

² N.Y. C.P.L.R. 7515, available [here](#).

³ *Id.*

⁴ *Id.*

⁵ *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (internal quotation marks, citations, and alterations omitted). Three additional cases relating to mandatory arbitration clauses were recently consolidated and are currently

pending before the Supreme Court. The cases address individual arbitration provisions that require employees to waive their right to bring claims on a collective or class basis. Those cases are: *Epic Systems Corp. v. Lewis*, No. 16-285 (2018); *Ernst & Young LLP v. Morris*, No. 16-300 (2018); and *National Labor Relations Board v. Murphy Oil USA*, No. 16-307 (2018).

6 N. Y. Gen. Oblig. Law § 5-336, available [here](#).

7 *Id.*

8 N.Y. Lab. Law § 201-g, available [here](#).

9 Although the state measure does not define “interactive,” the city Act provides such a definition, as discussed in the section concerning the city’s requirement of mandatory employee sexual harassment prevention trainings.

10 N.Y. Exec. Law § 296-d, available [here](#).

11 *Id.*

12 N.Y. City Law 2018/096, available [here](#).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 N.Y. City Law 2018/100, available [here](#).

21 N.Y. City Law 2018/098, available [here](#).

22 N.Y. City Law 2018/095, available [here](#).

23 S. Bill 6313, (Wash. 2018), available [here](#).

24 S. Bill 820, Reg. Sess. (Ca. 2018) (“[A] provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action . . . [alleging sexual assault or harassment; harassment or discrimination based on sex, or the failure to prevent such harassment or discrimination; or retaliation against a person for reporting harassment or discrimination based on sex].”), available [here](#).

25 S. Bill 121, 218th Gen. Assemb., Reg. Sess. (N.J. 2018) (“A provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.”), available [here](#).

26 S. Bill 999, 201st Gen. Assemb., Reg. Sess. (Pa. 2017) (“[N]o person may enter into, revise or amend an agreement, contract, settlement or similar instrument which includes a provision that . . . prohibits or attempts to prohibit the disclosure of the name of any person suspected of sexual misconduct [or] suppresses or attempts to suppress information relevant to an investigation into a claim of sexual misconduct. . . .”), available [here](#).

27 S. Bill 1300, Reg. Sess. (Ca. 2018) (“It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment . . . to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.”), available [here](#).

28 S. Bill 132, Reg. Sess. (Conn. 2018), available [here](#).

29 S. Bill 1010, Reg. Sess. (Md. 2018), available [here](#).

30 H. Bill 4433, 122nd Gen. Assemb., Reg. Sess. (S.C. 2018), available [here](#).