Happy October! - A New Round of State Sexual Harassment Guidance And City Laws to Kick Off the Scariest Month of the Year

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New York State and City have each passed new legislation addressing workplace sexual harassment and employer accommodations, which both have deadlines looming for New York employers.

Just in time – on October 1, the State DOL (finally) clarified – in a good way – a number of employer obligations under the State law. The State DOL also launched a website "Combating Sexual Harassment In the Workplace," and an "Employer Toolkit," with sample policies, complaint forms, and training materials. Easing sleepless nights for many employers, the DOL stated that training under the state law does not have to be completed **until October 2019**.

Because there can never be one without the other, effective **October 15, 2018,** the New York City Human Rights Law ("CHRL") will now require covered employers to engage in or seek to engage in a "cooperative dialogue" with individuals who may be entitled to accommodations. This new law provides a separate cause of action against an employer for not engaging in a "cooperative dialogue" – but more on that later.

STATE LAW - WHAT YOU NEED TO KNOW NOW

By October 9, 2018 – New York employers need to update their harassment policies to ensure they contain certain components:

- Prohibit sexual harassment and "clearly state" that it is a form of employee misconduct;
- Provide examples of prohibited conduct;
- Include information concerning the federal, state and local laws and remedies available, including available forums;
- Include a complaint form or access to a complaint form;
- Explain the procedure for a confidential investigation of complaints;
- State that sanctions will be imposed on those who engage in sexual harassment and against managers who knowingly allow such behavior to continue; and
- State that retaliation against those who complain or who testify or assist in any investigation or

proceeding is unlawful.

We caution employers to look carefully at the model forms and policy which the State DOL has provided, as they are far from perfect and in some cases go beyond what the law requires. Use these as guidance, but we **do not** recommend adopting these models without modifying to fit your needs. For example:

- **The Model Complaint Form:** The model form properly asks about the nature of the complaint, the parties involved, potential witnesses, whether the individual has previously made complaints of harassment, and information about an attorney, if the employee has retained one. However, the model complaint form is worded to assume that there has been "sexual harassment." Also, the model form sets out in detail the investigatory procedures, which we do not believe is required under the law.
- **The Model Policy:** The model sexual harassment prevention policy properly explains what harassment is. It also removed the suggestion that the investigation of any complaint had to be completed within 30 days, which is not required by law.
    - Additionally, the model policy provides proposed steps for any investigation of sexual harassment that includes "an immediate review" of the allegations, again we do not believe this is required by the law, and is not a good idea.
    - On a positive note, the State is allowing employers who already have an investigative process in place to keep that process as long as it is outlined in the policy.
    - Additionally, the DOL removed the term "zero tolerance" from suggested policies; a harsh term that could frighten employees who want to report harassment, because it implies that every incident will result in termination. That is a welcome change.
- **The Training:** The State FAQs are an improvement over material which was released in August. It states that the deadline to complete employee training is October 9, 2019, rather than by January 1, 2019 and are only required for employees who work or will work in New York State. We, however, recommend training ALL managers, including those working outside of the state.
    - Training may be provided in English initially, but will eventually have to be offered in other languages.
    - Employers are required to train ALL employees (including per diem and part time employees).
    - Employers are not required to train non-employees (like vendors or contractors). There is no set time duration for training, as long as it covers all necessary elements. Newly hired employees may be trained "as soon as possible," rather than within 30 days.

Further, the training must be "interactive" (a video may suffice, if there is some way for the employee to ask questions) and include the following;

• An explanation of sexual harassment consistent with guidance issued by the State DOL and the Division of Human Rights;

• Examples of conduct that would constitute unlawful harassment;

• Information concerning employees' rights and the forums for filing complaint;

• Information concerning the federal and state statutory provisions concerning harassment and remedies available to victims; and

• Information addressing conduct by supervisors and any additional responsibilities for such supervisors (there may be a separate and different training module for supervisors and managers).

CITY LAW - WHAT YOU NEED TO KNOW NOW

Beginning **October 15**, New York City employers analyzing employee accommodation requests will be required to engage in a new process called a "**cooperative dialogue**." While this sounds similar to the "interactive process" that employers have been using for years, employers will have to revamp their policies to abide by this new standard since failing to engage in a "cooperative dialogue" constitutes an independent violation of the CHRL.

The employer must use the "cooperative dialogue" process when an employee seeks an accommodation for any lawful purpose, such as for a disability or religious needs. The employer must initiate the cooperative dialogue either when the employee makes a request, or when the employer should have known about the potential need for an accommodation. Under the law, the cooperative dialogue is meant to be a "written or oral dialogue" concerning the needs for an accommodation, potential accommodations, alternatives, and difficulties the accommodation may pose for an employer.

Once put on notice of a request, employers are required to engage in the cooperative dialogue in an expeditious manner. The employer must continue the dialogue until it determines that the accommodation request can either be granted or denied. This means that even if the employer offers an accommodation, and the employee reasonably determines that the accommodation does not meet their needs, the employer must continue with the dialogue to find a sufficient alternative, if available. An employer cannot determine there is no accommodation without first engaging in the cooperative dialogue. At the same time, the employee is not necessarily entitled to the specific accommodation they request if the employer identifies a sufficient alternative.

Under the legal guidance issued by the City Commission, the cooperative dialogue must continue until: (1) a reasonable accommodation is granted; or (2) the employer reasonably determines there is no accommodation that will not cause undue hardship; the employee did not accept a sufficient accommodation and no alterative was identified; or there is no accommodation that will allow the employee to perform the essential functions of their job.

Once the cooperative dialogue concludes, the employer must promptly notify the employee in writing of the outcome. This notice must provide the employee with a written determination as to whether the request was granted or denied.

Things to Consider: This new harassment law and "cooperative dialogue" process add to what is already a daunting list of legal mandates for New York employers. They also raise questions:

- Should we have the same policy for all employees, even those outside New York?
- Should we train everyone, now that several states (like New York and California) require training?
- Is it worth it to invest in live training?

- Does my Human Resources and Compliance staff know how to investigate these types of issues?
- Do our managers know the law and know about the “cooperative dialogue”?

There are no one-size-fits-all answers here but generally, employers should begin revising their harassment and reasonable accommodation policies. Employers should also train their supervisors and human resources employees on the new cooperative dialogue process.

To determine the best approach for compliance with the new State and City laws for your company, we encourage employers to contact Barbara Hoey, Mark Konkel or any attorney in our Employment Group.