“Times Up” for New York Employers - Governor Cuomo Signs Historic Anti-Harassment Legislation

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On April 12, 2018, New York Governor Andrew Cuomo signed into law the New York State budget bill, which makes some big changes in the obligations of New York employers relative to sexual harassment.

The new law has both immediate and rolling implications for all New York employers.

EFFECTIVE IMMEDIATELY (I.E., RIGHT NOW)

The New York State Human Rights law now extends protections to certain non-employees, including ***contractors, subcontractors, vendors, consultants, and other persons providing services pursuant to a contract.***

This means that employers may now be held liable for the sexual harassment of non-employees if the employer, its agents, or supervisors knew or should have known that the non-employee was subjected to sexual harassment and the employer failed to take appropriate corrective action.

This is a significant change in the law and employers should make sure that Human Resources and managers are aware of it.

ROLLING PROVISIONS

July 11, 2018: No NDA’s and No Mandatory Arbitration - New York employers will be prohibited from using nondisclosure clauses in harassment settlements, unless the complainant prefers that the settlement be confidential. Like the OWBPA, the agreements must also give the complainant 21 days to consider signing, and 7 days to revoke.

New York employers may not require mandatory arbitration of claims of workplace sexual harassment, to the extent this is “not inconsistent with federal law.”

October 9, 2018: Mandatory Training Provision Roll Out - Employers must distribute written anti-harassment policies in the workplace; and Employers must conduct annual anti-harassment training for all employees, based on models to be developed and published by the New York State Department of Labor and the New York State Division of Human Rights.

The model training must include: (1) an explanation of sexual harassment; (2) examples of conduct that would constitute unlawful sexual harassment; (3) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims; and (4)

information concerning employees' rights of redress and all available forums for adjudicating complaints. The training must also include information addressing the conduct and additional responsibilities for supervisory personnel.

January 1, 2019: Government Contractor Affirmation - Employers who wish to bid on certain state contracts will be required to affirm that the employer has implemented a written policy addressing sexual harassment in the workplace and that it provides annual sexual harassment prevention training to all of its employees.

IMMEDIATE QUESTIONS AND ANSWERS The new law raises many questions, and given that there is little regulatory guidance, we admittedly do not have all of the answers. These are some initial thoughts in response to questions which have already been presented:

Question 1: If I have an arbitration policy or program, do I now need to amend existing arbitration provisions in handbooks or employment agreements?

This is unclear. If your clause or policy now covers sexual harassment claims, the safer course would be to issue an amendment or written clarification. The problem becomes, do you have to have all employees sign again? This again is unclear. However, if a new policy is issued, most lawyers will advise that it is better to get sign off's from the employees.

If your policy or agreement contains a legal 'savings' clause, you may not have to amend it. It may be sufficient to leave it as is, and just understand that it no longer applies to harassment claims. If you go this route, you may want to issue a statement to employees to clarify that harassment claims are no longer covered by the program.

Hopefully, these questions will be answered before July 11 with some regulatory guidance.

Question 2: If I already have a harassment policy, do I need to hand it out again?

Although there is no legislative guidance on this issue, we recommend that even if you have an existing policy that you have distributed to employees in the past—pass it out again. Better yet, pass it out during mandatory harassment training and have all employees sign an acknowledgment form.

If you are going to redistribute and have employees sign, make sure to remove harassment claims from the list of claims to be arbitrated.

Question 3: Do I have to start a training program in 2018?

Probably not. Since that provision of the law goes into effect on October 9, 2018, you likely have a year from October 9, 2018 to conduct training.

Question 4: Must the training be live?

That is unclear. The text of the law provides that the Department of Labor's model training program "shall be interactive," but it does not specify whether training must be live. We recommend that employers assume that "interactive" training means live training until there is further guidance and/or regulations issued by the Department of Labor.

GOING FORWARD It remains to be seen where this new law will take us. The arbitration provision is arguably inconsistent with the Federal Arbitration Act and could be preempted.

Either way, employers in New York should begin implementing these major changes now. In addition,

when the Department of Labor issues the model policy and training program, employers who have existing policies and programs should ensure that their policies and programs measure up to the Department of Labor's model.

We will continue to report on any further developments with regard to this important new legislation.