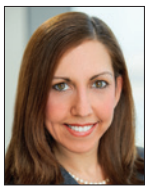
New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 259—NO. 105
FRIDAY, JUNE 1, 2018

LABOR RELATIONS

Expert Analysis

New York Employers Face New Sexual Harassment Legislation



By **David E. Schwartz**

And **Risa M. Salins**

In the wake of the #MeToo movement, employers operating in New York will be subject to sweeping new laws aimed at curtailing sexual harassment in the workplace. On April 12, Gov. Andrew Cuomo signed into law the New York State Budget Bill for Fiscal Year 2019 (the Executive Budget), which he termed "the nation's most aggressive anti-sexual harassment agenda." In addition, on May 10, Mayor Bill de Blasio signed into law the Stop Sexual Harassment in New York City Act, described by the city council as critical to creating safe workplaces in New York City. This month's column reviews the new requirements of these New York state and city laws.

Nondisclosure Agreements

Settlement agreements related to sexual harassment claims typically have included nondisclosure clauses restricting disclosure of the terms of the agreement. Pursuant to the Executive Budget, as of July 11, New York state employers may not include confidentiality provisions in settlement agreements for sexual harassment complaints, unless keeping the matter confidential is "at the complainant's preference." If the complainant requests confidentiality, the nondisclosure language must first be provided to all parties. The new law requires a consideration and revocation period, like those required by the Age Discrimination in Employment Act, under which the complainant has 21 days to consider whether or not to accept the confidentiality language, and then has seven days to revoke his or her acceptance before the agreement becomes effective. If the complainant chooses to revoke his or her acceptance, the entire agreement is revoked.

> The new law explicitly states that where there is a conflict with a collective bargaining agreement, the collective bargaining agreement shall be controlling.

Section 5-336 was added to the New York General Obligations Law and Section 5003-b was added to the New York Civil Practice Law and Rules (CPLR) to reflect these new prohibitions and requirements. Section 5003-b applies to settlements of sexual harassment lawsuits filed in New York courts. By comparison, Section 5-336 appears to apply to settlements of all claims of sexual harassment.

With respect to nondisclosure clauses, employers also should be cognizant that a provision buried in

DAVID E. SCHWARTZ *is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* GRACE JUN, *an associate at the firm, assisted in the preparation of this article.*

the Tax Cuts and Jobs Act (signed into law on Dec. 22, 2017) added a new Section 162(q) to the Internal Revenue Code, which prohibits employers from deducting costs related to sexual harassment settlements that are subject to nondisclosure agreements.

Mandatory Arbitration

The Executive Budget also adds Section 7515 to the CPLR to prohibit mandatory arbitration clauses from applying to claims or allegations of sexual harassment. This prohibition is effective for contracts entered into on or after July 11, 90 days after enactment of the law. It also purports to declare, as of the effective date, null and void clauses in existing contracts that mandate arbitration of sexual harassment claims. However, the new law does not affect the enforceability of mandatory arbitration clauses to arbitrate other claims. In addition, the law applies only to pre-dispute arbitration agreements. So, parties may continue to agree to arbitrate claims after a dispute arises.

Importantly, for union employers, the terms of a collective bargaining agreement may continue to require arbitration of sexual harassment claims. The new law explicitly states that where there is a conflict with a collective bargaining agreement, the collective bargaining agreement shall be controlling.

Employers will, no doubt, argue that this new prohibition is preempted by the Federal Arbitration Act, which establishes Congress' preference for arbitration as a means of dispute resolution and preempts any state rule discriminating on its face against arbitration.

Policies and Training

Both the New York state and New York City laws now mandate that employers have written sexual harassment prevention policies and provide sexual harassment prevention training to all employees on an annual basis. In particular, the Executive Budget amends the New York Labor Law to require all employers to adopt and implement a written sexual harassment policy that meets or exceeds minimum standards to be set by the New York Department of Labor (NYDOL) in consultation with the New York Division of Human Rights (NYDHR). The NYDOL and the NYDHR will create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy that will be available on both agencies' websites. Effective Oct. 9. Employers must adopt the model policy or establish a policy that meets or exceeds the model standards.

Both the New York state and New York City laws now mandate that employers have written sexual harassment prevention policies and provide sexual harassment prevention training to all employees on an annual basis.

Employers may use their own sexual harassment policy as long as it includes, among other things, a statement prohibiting sexual harassment; examples of what constitutes unlawful sexual harassment; information about federal and state statutory remedies for victims of sexual harassment; a standard complaint form; a procedure for investigation of complaints; all available administrative and judicial forums in which to raise sexual harassment claims; remedies available to victims of sexual harassment; and a provision stating that retaliation against individuals who complain of sexual harassment or who testify or assist anyone making such a complaint is unlawful.

Effective Oct. 9, the Executive Budget also requires that employers provide sexual harassment prevention training on an annual basis. Once again, the NYDOL and NYDHR will develop a model sexual harassment prevention training program that employers may use to comply with the law. However, employers may use their own training as long the training is interactive and it includes, among

other things, an explanation of the legal definitions of sexual harassment and examples, and information on all possible forums for filing complaints and the remedies available.

Notably, effective as of Jan. 1, 2019, all bidders for contracts with New York state, or any state department or agency, must certify that they have implemented a written policy addressing sexual harassment prevention in the workplace and that they have provided annual training for all employees that meet the requirements described above. This requirement is codified in the New York State Finance Law.

There are key additional requirements under the New York City law with respect to policies and training. First, effective April 1, 2019, New York City employers with 15 or more employees must conduct training for all new employees and interns within 90 days of commencement of employment. New York City employers also will be required to obtain signed employee acknowledgments that they received training and maintain records of the signed acknowledgements for three years. Furthermore, as of Sept. 7, New York City employers will be required to display a new anti-sexual harassment poster created by the New York City Commission on Human Rights in employee breakrooms or other common areas.

Non-Employees

Historically, contractors, vendors and consultants have not been covered by New York State law prohibiting sexual harassment. Effective April 12, the Executive Budget added a new Section 296-d to the New York State Human Rights Law, which makes it unlawful for an employer to permit sexual harassment of such non-employees in the employer's workplace. An employer may be liable if it knew or should have known that a non-employee, such as a contractor, vendor or consultant, was subjected to sexual harassment in its workplace and failed to take immediate and appropriate corrective action.

City Employers

New York City employers should be aware of several significant provisions of the new New York City law which took effect immediately upon Mayor de Blasio's signature. First, the new New York City law clarifies that sexual harassment is a form of discrimination under the New York City Human Rights Law (NYCHRL). Second, employees now have three years (as opposed to one year) to file a claim of gender-based harassment under the NYCHRL. Finally, the NYCHRL's prohibition on gender-based harassment now applies to all New York City employers. Previously, only employers with four or more employees were subject to this provision.

Conclusion

New York employers are advised, at a minimum, to take the following steps to comply with the new state and city sexual harassment laws:

- Review, when they become available, New York state's model sexual harassment prevention policies and training programs.
- Review and revise, as necessary, policies regarding sexual harassment in the workplace, and include references to non-harassment of contractors, vendors and other non-employees.
- Prepare to provide sexual harassment training for employees and managers on an annual basis.
- Train human resources professionals and in-house counsel about nondisclosure provisions in settlement agreements relating to sexual harassment claims.
- Review arbitration agreements and programs to determine if changes are required with respect to arbitration of sexual harassment claims.
- For New York City employers, reconcile differences in the requirements under state and city laws so that training programs incorporate all rules and parameters set forth under both state and city laws.