

LEGAL ADVISORY

FROM: Paul H. Pincus
TO: Clients and Friends
DATE: September 10, 2018
RE: New York State and New York City Enact Sweeping
Laws to Prevent Workplace Sexual Harassment

In response to the #MeToo movement, New York State and New York City have recently enacted sweeping and partially overlapping workplace anti-sexual harassment laws, some provisions of which have already gone into effect while others will go into effect between now and April 1, 2019 (as indicated below). The new laws apply to both staff employees (full-time and part-time) and, for staffing firms, consultants/temporary employees who are their employees. Perhaps the most significant of the new provisions is mandatory annual sexual harassment training for employees.

I. NEW YORK STATE

A. Overview

The 2018 - 2019 State Budget that was signed into law by Governor Cuomo in April of this year contains the following significant provisions addressing workplace sexual harassment:

- **Effective April 12, 2018** – the New York State Human Rights Law has been expanded to protect non-employees (contractors, subcontractors, vendors, consultants and other persons providing services pursuant to a contract (and their employees)) from sexual harassment at an employer’s worksite where the employer, its agents or supervisors, “knew or should have known” that the non-employee was subjected to sexual harassment at its worksite and failed to take appropriate corrective action.
- **Effective July 11, 2018** – a ban on pre-dispute contract provisions requiring the mandatory arbitration of sexual harassment claims, except where inconsistent with federal law¹ or collective bargaining agreements.

¹ Future court challenges may hold that this provision is pre-empted by the Federal Arbitration Act, particularly in light of the broad language favoring arbitration contained in the U.S. Supreme Court’s recent Epic Systems v. Lewis decision (holding that the Federal Arbitration Act permits employers to require individual arbitration of wage and hour claims).

- **Effective July 11, 2018** – a ban on confidentiality provisions in settlement agreements that would prevent disclosure of the underlying facts of a sexual harassment claim, unless the confidentiality provision is the “complainant’s preference,” the complainant’s preference for the confidentiality provision is set forth in the settlement agreement, the complainant is given 21 days to consider the confidentiality provision and seven days following signing of the settlement agreement to revoke the agreement.²
- **Effective October 9, 2018** – all employers with employees who physically work in New York State (regardless of the number of such employees) must adopt and distribute to such New York-based employees (including, for staffing firms, consultants/temporary employees who are their employees) a written anti-sexual harassment policy (that includes a standard complaint form) and implement annual interactive anti-sexual harassment training programs for such employees (including, for staffing firms, consultants/temporary employees who are their employees) that meet or exceed (i) policies and programs to be promulgated by the New York State Department of Labor or (ii) certain specified requirements of the New York State Department of Labor and the Division of Human Rights.
- **Effective January 1, 2019** – all companies submitting bids for New York State contracts must certify under penalty of perjury in their applications that they have adopted written anti-sexual harassment policies and annual interactive anti-sexual harassment training programs that comply with the foregoing requirements contained in the new State law.

B. Mandatory Anti-Sexual Harassment Policy and Training

The law requires the Department of Labor, in consultation with the Division of Human Rights, to create and publish a model sexual harassment preventive guidance document and policy that employers may use. That policy would:

- prohibit sexual harassment and provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- include a standard complaint form;
- include a procedure for the timely and confidential investigation of complaints and due process for all parties involved;
- inform employees of their rights of redress and all available administrative and judicial forums for determining their sexual harassment complaints;

² This requirement adopts the time periods for review and revocation contained in the federal Older Workers Benefit Protection Act for settlement agreements with employees over 40 years old.

- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The law also requires the Department of Labor, in consultation with the Division of Human Rights, to develop an interactive training program that includes:

- an explanation of sexual harassment;
- examples of conduct that would constitute unlawful sexual harassment;
- information concerning the federal and state statutory provisions concerning sexual harassment;
- remedies available to victims of sexual harassment;
- information concerning employees' rights of redress and all available forums for determining their complaints; and
- conduct by supervisors and any additional responsibilities for them.

C. New York State Draft Guidance

In August, New York State issued for comment³ draft guidance under the new law and created a dedicated website (<https://www.ny.gov/programs/combating-sexual-harassment-workplace>) that contains a model sexual harassment prevention policy, a model complaint form, frequently asked questions, and model training materials. The website also contains proposed “minimum standards” guidelines for employers to use if they wish to create their own anti-sexual harassment policies and training programs.

The draft guidance states that all New York State-based employees (regardless of the number of hours per week or number of weeks that they work in New York State) must complete the model training or a comparable training that meets the minimum standards by **January 1, 2019**; and, thereafter, they must be trained at least once per year. In subsequent years, this may be based on the calendar year, anniversary of each employee’s start date or any other date the employer chooses. New employees who start work after January 1, 2019 must complete their training within 30 calendar days after “starting their job.” For consultants/temporary employees who are employees of staffing firms, we believe this means within 30 calendar days after commencing their first assignment for the staffing firm.

Since the guidance does not specifically address consultants/temporary employees who are employees of staffing firms, it is presently unclear whether the annual training requirement will continue for such a consultant/temporary employee who does not work for a staffing firm in a subsequent year but remains in its general candidate pool.

³ The comment period ends on September 12, 2018, after which final guidance and materials will be issued.

Although the guidance does not address the obligation to pay for time spent in training, we believe that hourly employees (including, for staffing firms, consultants/temporary employees who are their employees and paid hourly) must be paid for such time since it is being required of them by their employer. However, a staffing firm theoretically could pay such consultants/temporary employees at a lower hourly rate for such training time than the rate they are paid when assigned to clients.

The draft guidance defines “interactive training” to mean that it requires some form of employee participation, such as:

- web-based with questions asked of employees as part of the program;
- accommodating questions asked by employees;
- a live trainer made available during the session to answer questions; and/or
- feedback from employees about the training and the materials presented.

II. NEW YORK CITY

On May 9, 2018, Mayor de Blasio signed into law the Stop Sexual Harassment in NYC Act (the “Act”), consisting of a series of 11 separate bills to combat workplace sexual harassment. Some of the Act’s provisions have already gone into effect and other parts will go into effect between now and April 1, 2019, as indicated below. The key provisions of the Act, which overlap in part with the new New York State anti-sexual harassment law, are as follows.

- **Effective May 9, 2018** – the New York City Human Rights Law (the “NYCHRL”) has been amended to permit sexual harassment claims by employees, regardless of the size of the employer.⁴ In addition, the statute of limitations for filing complaints with the New York City Commission on Human Rights has been extended from one year to three years after the alleged conduct took place.
- **Effective September 6, 2018** – New York City employers are required to conspicuously post in their NYC offices an anti-sexual harassment rights and responsibilities poster (both in English and Spanish) and distribute an information sheet on sexual harassment to their NYC-based employees (including, for staffing firms, consultants/temporary employees who are their employees) who start work on and after that date, on forms to be issued by the Commission on Human Rights. The information sheet may be, but is not required by law to be, distributed to NYC-based employees who started work prior to September 6, 2018. Copies of the recently issued poster and information sheet are attached to this Advisory.
- **Effective April 1, 2019** – employers with 15 or more New York City-based employees are required to conduct annual anti-sexual harassment training for all such employees, including

⁴ Previously, the anti-discrimination provisions of the NYCHRL applied only to employers with four or more New York City-based employees.

supervisory and managerial employees (and, for staffing firms, consultants/temporary employees who are their employees). For employees hired after April 1, 2019, such training is required after 90 days of “initial hire” for employees who work more than 80 hours in a calendar year in New York City, whether on a full-time or part-time basis.⁵ The Commission on Human Rights is to develop in the upcoming months a publicly available online sexual harassment training module that employers can use. The required training must be interactive and, subject to further guidance from the Commission on Human Rights, should largely track the requirements of New York State’s new anti-sexual harassment law, with the following specific requirements:

- ❖ a description of the internal complaint process available to employees to address sexual harassment claims;
- ❖ information concerning the complaint process available through the Equal Employment Opportunity Commission (EEOC), the State Division of Human Rights and the City Commission on Human Rights (including contact information for those agencies);
- ❖ an explanation of retaliation and examples of prohibited retaliatory conduct;
- ❖ information concerning bystander intervention, including resources that explain how to engage it; and
- ❖ specific responsibilities of supervisory and managerial employees in preventing sexual harassment and retaliation.

Under the Act, employers are required to keep a record of the training, including signed employee acknowledgments, for a period of three years. The City Commission on Human Rights’ dedicated website is located at (<https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page>).

We will provide further guidance as information becomes available.

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To the extent that companies with New York-based employees have not already done so, they should consult with counsel to update their handbooks and employment policies, review existing agreements that may contain provisions requiring the arbitration of sexual harassment claims, and prepare to implement the new anti-sexual harassment training requirements. Companies with 15 or more NYC-based employees should consider adopting policies and training programs that satisfy the requirements of both the New York State and New York City laws.

For more information about this Advisory or assistance with compliance, please contact Paul Pincus at (212) 588-0022 or php@orllp.legal.

⁵ The Act does not define “initial hire” and it is, therefore, unclear for staffing firms if that means when a consultant/temporary employee is accepted into its general candidate pool or commences an assignment. New York State’s more stringent requirement to provide training to employees within 30 calendar days after “starting their job” and without regard to the number of hours worked appears to override NYC’s more relaxed timeframe for training.

STOP SEXUAL HARASSMENT ACT NOTICE

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the poster requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to \$250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, require the violator to undergo training, and mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak

out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718-722-3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law, where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at www.dhr.ny.gov.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at www.eeoc.gov.

AVISO SOBRE LA LEY PARA DETENER EL ACOSO SEXUAL

Todos los empleadores deben proporcionar un aviso por escrito sobre los derechos de los empleados de conformidad con la Ley de Derechos Humanos de la Ciudad de Nueva York mediante un afiche exhibido y una hoja de información distribuida a cada empleado en el momento de la contratación. Este documento cumple con el requisito del afiche.

La Ley de Derechos Humanos de la Ciudad de Nueva York

La Ley de Derechos Humanos de la Ciudad de Nueva York, una de las leyes más rigurosas contra la discriminación del país, protege a todas las personas contra la discriminación debido al género, lo que incluye el acoso sexual en el lugar de trabajo, la vivienda y espacios públicos, como tiendas y restaurantes. Quienes infrinjan esta ley pueden ser responsables de sanciones civiles de hasta \$250,000 en el caso de una infracción intencionada. La Comisión también puede evaluar concederle a la víctima una indemnización por daños y perjuicios debido a angustia emocional y otros recursos, exigirle al infractor asistir a una capacitación y ordenar otras medidas, como servicio comunitario.

El Acoso Sexual Según la Ley

El acoso sexual, una forma de discriminación en función del género, es el comportamiento físico o verbal no deseado en relación con el género de una persona.

Algunos Ejemplos de Acoso Sexual

- Tocar a los empleados o clientes de manera inapropiada.
- Amenazar o actuar de manera adversa luego de que una persona rechaza una insinuación sexual.
- Hacer comentarios lascivos o sexuales sobre el aspecto, cuerpo o la forma de vestir de una persona.
- Condicionar ascensos u otras oportunidades en función de favores sexuales.
- Mostrar imágenes, dibujos o grafitis pornográficos en computadoras, correos electrónicos, teléfonos celulares, tableros de anuncios, etc.
- Hacer comentarios sexistas o despectivos en función del género.

La Ley Prohíbe Represalias

Es contrario a la ley que un empleador tome medidas en su contra por oponerse o expresarse en contra del acoso sexual en el lugar de trabajo. La Ley de Derechos Humanos de la Ciudad de Nueva York prohíbe a los empleadores tomar represalias o discriminar “de cualquier forma a una persona” por oponerse a una práctica discriminatoria ilegal. Las represalias pueden manifestarse a través de acciones directas, como descensos o despidos, o a través de comportamientos más sutiles, como un aumento en la carga de trabajo o la transferencia a un lugar menos deseable. La Ley de Derechos Humanos de la Ciudad de Nueva York protege contra las represalias a las personas que creen de buena fe que el comportamiento de su empleador es ilegal, incluso si resultan estar equivocadas.

Denuncie el Acoso Sexual

Si cree que es víctima de acoso sexual, infórmele lo antes posible a un gerente, al representante de igualdad de oportunidades laborales de su lugar de trabajo o al Departamento de Recursos Humanos.

Denuncie el acoso sexual ante la Comisión de Derechos Humanos de la Ciudad de Nueva York. Llame al 718-722-3131 o visite NYC.gov/HumanRights para saber cómo presentar una queja o denunciar un acto de discriminación. Usted puede presentar una queja de forma anónima.

Recursos del Gobierno Estatal y Federal

El acoso sexual también es ilegal en virtud de la ley estatal y federal.

Para presentar una queja ante la División de Derechos Humanos del Estado de Nueva York, visite el sitio web de la División en **www.dhr.ny.gov**.

Para presentar cargos ante la Comisión para la Igualdad de Oportunidades en el Empleo (EEOC) de los EE. UU., visite el sitio web de la EEOC en **www.eeoc.gov**.

STOP SEXUAL HARASSMENT ACT FACTSHEET

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