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ALERT

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Jonathan Trafimow


Caitlyn M. Ryan

New York Strengthens Sexual Harassment Rights For Employees—How Should Private Employers Respond?

New laws from both New York State and New York City give employees additional protections from harassment and impose new obligations on employers. Possible exposure to legal liability may persuade employers in the private sector to take additional steps beyond what the new laws formally require.

The New York State Law to Combat Sexual Harassment

The New York State budget, signed on April 12, 2018 contains provisions to combat sexual harassment. Requirements of this broad statute with the most immediate significance to most private employers include the following:

- **Sexual Harassment Defined**. The statute broadens the definition of sexual harassment. Any "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature" is sexual harassment if "made either explicitly or implicitly a term or condition of employment, or submission to or rejection of such conduct is used as the basis for employment decisions… [or] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." This is true, "even if the complaining individual is not the intended target of the sexual harassment." This provision takes effect on October 9, 2018.

- **Sexual Harassment by Non-Employees Prohibited**. Employers may be held legally liable under the new law for the acts of non-employees under certain circumstances. If the non-employee engages in sexual harassment that the employer (including its "agents or supervisors") knew or should have known of, and the employer fails to take immediate and appropriate corrective action, then the employer may be liable. The statute states that the "extent of the employer's control and any other legal responsibility which the employer may have had with respect to the conduct of those non-employees shall be considered." This provision is currently in effect.

- **Mandatory Arbitration Clauses Prohibited**. Effective July 11, 2018, contract provisions that require employees to submit sexual harassment claims to binding arbitration are prohibited, unless part of a collective bargaining agreement.

- **Anti-Sexual Harassment Policies and Training Obligations for State Contractors.** The law mandates that every contractor who receives a state

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contract must have in place an anti-sexual harassment policy, widely distribute the policy, make it available to every employee, and include it in every new employee orientation. These state contractors must also conduct annual anti-sexual harassment training, at least two hours long, interactive, and that covers certain topics. State contracts must contain clauses requiring the contractor to certify compliance with these requirements (or provide a signed statement explaining why it cannot do so). This provision takes effect on October 9, 2018.

- **Restrictions on Confidentiality Provisions in Settlement Agreements.** The law directs courts to reject any settlement of a sexual harassment case involving sexual harassment allegations that prevents the disclosure of any or all factual information related to the case unless the confidentiality provision is the complaining employee's preference and the court has considered the potential impact on the public and finds that the employee's preference is not the result of intimidation, coercion, retaliation or threats. The employee must have 21 days to consider whether or not to consent to confidentiality, and 7 days to revoke such consent. This provision takes effect on July 11, 2018.

Effective October 9, 2018, the law imposes new policy and training obligations on employers. The law requires the New York State Department of Labor to prepare a model training program. This training program must, among other things: define sexual harassment; provide examples; provide information concerning federal and state statutes and the available remedies they provide for victims of sexual harassment; and inform employees of their "rights of redress and the availability and forms of complaint resolution assistance available." The model policy must explain that sexual harassment is a form of employee misconduct, and that sanctions will be enforced against both individuals who engage in it and supervisors/managers who knowingly allow it to continue. The training must be at least two hours and interactive, providing certain information including examples of conduct that would be defined as unlawful.

The New York City Legislative Package

New York City has passed new training requirements that are effective now on employers with 15 or more employees. Such employers must now conduct annual anti-sexual harassment interactive training for all of their employees, including interns, supervisors and managers, after 90 days of initial hire. Employers may use computer or online training programs to satisfy these requirements.

The City has also expanded to all employers its local ordinance, the New York City Human Rights Law ("NYCHRL"), to apply provisions related to gender based discrimination (not just harassment). Previously, such provisions did not apply to employers with fewer than four (4) employees. In addition, the NYCHRL policy statement now expressly includes sexual harassment as a form of discrimination that the City Commission on Human Rights ("CCHR") has the power to eliminate and prevent.

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Perhaps most importantly, the City has increased the time for which claims of sexual harassment can be made from one (1) year to three (3) years from the time that the alleged harassment occurred. This increased time to sue would apply to harassment claims based on unwelcome conduct that interferes with, oppresses, threatens, humiliates or degrades a person based on the person's gender.

Implications for Employers

On both the State and the City levels, the implications of these legislative changes are profound. Compliance with the policy and training requirements is not only required, but, at least in certain cases, will be crucial to employers as they defend themselves against claims of workplace sexual harassment. Beyond policies and training, individual employment contracts should be reviewed for, among other things, responsibilities to non-employees and arbitration provisions. Employers ignore these new requirements at their peril.

Any issues raised in this Alert may be addressed to Mr. Trafimow who can be reached at: (516) 873-2000 or by email at jtrafimow@moritthock.com.

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This Alert was written by A. Jonathan Trafimow. Caitlyn M. Ryan assisted in the preparation of this Alert.

Mr. Trafimow, a partner with the firm, heads the firm's employment practice where he represents employers in all areas of discrimination, retaliation, harassments and civil rights claims, and class actions. He also routinely advises employers on compliance employment laws and regulations.

Ms. Ryan, an associate of the firm, concentrates her practice in all facets of corporate and employment related matters.

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