Hospitality and Labor & Employment
ALERT
Fox Rothschild LLP
ATTORNEYS AT LAW

April 2018

New Sexual Harassment Prevention Requirements for New York Employers

By Carolyn D. Richmond, Glenn S. Grindlinger and Bryn Goodman

As part of the budget bill Gov. Andrew Cuomo is expected to sign within the next few days, New York will impose heightened obligations on employers to prevent sexual harassment.

If enacted, the legislation will require the New York State Department of Labor ("DOL") to prepare model sexual harassment prevention policies and trainings, require employers to conduct annual employee harassment training sessions, create reporting obligations for state contractors, and limit the use of mandatory arbitration clauses and nondisclosure agreements ("NDA"). Accordingly, New York employers should start reviewing current arbitration agreements and NDA's in place with employees and be prepared to modify (and/or implement) their sexual harassment policies and trainings programs

Required Sexual Harassment Prevention Policies and Trainings

The budget bill requires employers on an *annual* basis to implement written sexual harassment prevention policies, provide such policies to their employees, and train employees on sexual harassment prevention. The DOL, in consultation with the New York State Division of Human Rights ("DHR"), is charged with creating a model sexual harassment prevention policy and a model sexual harassment training program.

The bill outlines mandatory provisions to be included in the model sexual harassment prevention policy:

- Prohibit sexual harassment consistent with guidance issued by the DOL 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 ensure due process for all parties;
- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- 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 mandates that model training programs include:

- An explanation of sexual harassment consistent with guidance issued by the department in consultation with the DHR;
- Examples of conduct that would constitute unlawful sexual harassment;
- Information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;

- Information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- Information addressing conduct by supervisors and any additional responsibilities of such supervisors.

Employers can use the model policies and training programs created by the DOL or implement their own policies and training programs provided that such policies and programs equal or exceed the minimum standards set by the DOL. Employers will have 180 days after the bill becomes law to implement the sexual harassment prevention policies and training programs.

Limitations on Arbitration Clauses and Nondisclosure Agreements

In addition to imposing new sexual harassment prevention policy and training requirements, the budget bill restricts arbitration clauses and nondisclosure agreements related to sexual harassment claims. Specifically, the law prohibits the inclusion of mandatory arbitration provisions in contracts to resolve sexual harassment claims. Any contract (other than a collective bargaining agreement) entered into on or after the ninetieth day after the budget bill is signed by the Governor will be null and void with respect to that portion of an existing mandatory arbitration agreement that requires sexual harassment claims to be subject to binding mandatory arbitration.

The legislation does not appear to impact contracts containing mandatory arbitration provisions that are or were executed prior to the ninetieth day after the budget bill is signed by the Governor. Further, collective bargaining agreements are specifically excluded from this legislation and therefore mandatory arbitration of sexual harassment claims set forth in collective bargaining agreements remain unimpeded. Whether the ban on mandatory arbitration of sexual harassment claims outside of the collective bargaining context violates the Federal Arbitration Act will likely be addressed by the judiciary in the near future.

The legislation also prohibits certain nondisclosure clauses in settlement or other agreements resolving sexual harassment claims, unless, such a clause is the complainant's preference. To ensure that the complainant prefers to include a nondisclosure clause, the complainant will have 21 days to consider the clause before signing the agreement. After signing the agreement, the complainant will have seven (7) days to revoke the agreement. The agreement will not become effective until after the revocation period has expired.

Specifically, the budget bill prohibits clauses that prevent individuals from disclosing the underlying facts and circumstances to the claim or action unless it is the complainant that desires to keep such information confidential. The legislation is silent on whether an employer can insist that the financial terms of any settlement or other resolution can remain confidential.

These prohibitions on mandatory arbitration of sexual harassment claims and nondisclosure clauses will become effective 90 days after the bill becomes law.

Protections for Nonemployees under the State Human Rights Laws

The legislation immediately modifies the definition of discriminatory conduct to include protections for nonemployees (i.e. contractors, sub-contractors, vendors or consultants). Previously, an employer was generally not liable for sexual harassment allegedly suffered by individuals who the employer did not employ (other than interns). Now, an employer may be liable for sexual harassment suffered by nonemployees, such as contractors, subcontractors, vendors, consultants or other persons providing services under a contract, when the harassment occurs at the employer's workplace and if (1) the employer or its agents or supervisors knew or should have known that the nonemployee was subjected to sexual harassment in the workplace and (2) the employer failed to take immediate and corrective action.

State Contractor Requirements

In addition to the new requirements placed on private sector employers, the law also imposes immediately effective requirements for state

contractors and state employees or employees of public entities (*i.e.* cities, towns, villages, schools, commissions etc.). Any company submitting a bid for a government contract, must certify in its bid, under penalty of perjury, that it has implemented a written sexual harassment prevention policy and annual sexual harassment prevention training that meets the DOL's model policy and training standards.

In light of the budget bill, New York employers should reevaluate their agreements that they have with employees and new hires to ensure that they do not contain clauses that require mandatory arbitration of sexual harassment claims or nondisclosure provisions that would prevent employees from disclosing the facts and circumstances giving rise to their sexual harassment claims.

Further, all New York employers should be prepared to implement written sexual harassment prevention policies and training programs, and they should periodically review the DOL's website to learn about the model policies and training programs that the DOL must issue. For those employers who already have anti-harassment policies and prevention training programs, such employers should review their policies and training programs to ensure that they comply with the new requirements discussed above and that they meet the minimum standards established by the DOL.

For more information about this alert, please contact Carolyn D. Richmond at crichmond@foxrothschild.com or 212.878.7983, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com or 212.905.2305, or any member of Fox Rothschild's New York Labor & Employment Department. Visit us on the web at www.foxrothschild.com.