KAUFMAN | DOLOWICH

Mansfield Rule Certified 2022-2023

New York State and New York City Pass New Requirements for Employers to Combat Sexual Harassment

By Keith Gutstein, Esq., co-managing partner in the Long Island office of Kaufman Dolowich & Voluck, LLP and Aaron Solomon, Esq. attorney at KD located in the Long Island office.

The State of New York and New York City have each enacted legislation to combat workplace sexual harassment. Both statutes impose heightened obligations for employers doing business in those jurisdictions. On April 11, 2018, the New York City Council passed a package of legislation known as the Stop Sexual Harassment in NYC Act. The very next day, Governor Cuomo signed a 2019 Budget Bill (the "Budget Bill") that contained sweeping revisions to several statutes.

A. The New York State Budget Bill

The Budget Bill requires all employers in New York State to promulgate anti sexual harassment policies by October 9, 2018. These policies must meet or exceed the standards of a forthcoming model policy that will be prepared by the New York State Department of Labor ("DOL") and the New York State Division of Human Rights ("DHR"). Although the model policy has not been drafted, the Budget Bill mandates that it include:

a. A prohibition against sexual harassment (with examples explaining what sexual harassment is);
b. Information addressing the federal and state provisions concerning sexual harassment (as well as a statement advising employees that there may be local laws addressing same) and remedies available to victims of harassment;
c. A standard complaint form;
d. Policies and procedures for the investigation of complaints;
e. A statement that advises employees that sexual harassment is a form of misconduct and that any employee engaging in same, and any supervisor or manager who knowingly allows such behavior to continue, will be sanctioned appropriately; and
f. A statement that retaliation against individuals who complain about sexual harassment (or who testify or assist in any proceeding under the law regarding same) is unlawful.

The Budget Bill also requires that, by October 9, 2018, all employers provide sexual harassment training, which must be equal to or exceed the standards of a model training program that will be developed by the DOL and DHR. The Budget Bill requires that the model training program include:

a. An explanation of sexual harassment;
b. Examples of conduct that constitutes sexual harassment;
c. Information about the federal and state statutory provisions concerning sexual harassment and remedies available to victims;
d. Information concerning employees' rights of redress and all available forums for adjudicating complaints; and
e. Information addressing conduct by supervisors and any additional responsibilities of supervisors.

The Budget Bill requires that training be interactive, but it does not specify whether interactive training must be conducted in person, through the internet, or by other remote means.

Employers will be responsible for harassment of non-employees – Effective immediately, an employer may be liable for permitting sexual harassment of contractors, subcontractors, vendors, consultants and other contracted service providers, if the employer knew or should have known that sexual harassment was occurring and failed to take appropriate action to address it.

Arbitration clauses will be limited – On and after July 11, 2018, employers will not be permitted to include provisions in contracts subjecting sexual harassment claims to mandatory arbitration. Any portion of a contract (other than a collective bargaining agreement), that is entered into on and after July 11, 2018, requiring mandatory arbitration of sexual harassment claims, will be null and void. The legislation does not appear to impact contracts containing mandatory arbitration provisions that are, or were, executed prior to July 11, 2018.

Employers will face new obstacles to obtaining confidential settlements of sexual harassment claims – Unless the condition of confidentiality is a complainant's preference, the law will no longer permit confidentiality provisions in agreements resolving claims involving sexual harassment prohibiting a complainant from discussing the facts and circumstances of his/her claim. If a settlement agreement contains such a confidentiality provision, the complainant must be afforded twenty-one (21) days to review the agreement before signing it. Once the complainant executes the agreement, he/she will have seven (7) days to revoke his/her acceptance of same. The law does not address whether a complainant can waive the twenty-one (21) day review period and is silent on whether an employer can insist that the financial terms of any settlement remain confidential.

B. The New York City Council's Legislation

If the Stop Sexual Harassment in NYC Act is signed by Mayor DiBlasio, which is anticipated, commencing on April 1, 2019, NYC employers, with more than fifteen (15) employees, will be required to provide interactive annual sexual harassment training to employees. In addition, both part-time and full-time employees, who work more than 80 hours in a calendar year, will need to receive training within ninety (90) days of their hire date, unless they received training within the same annual cycle from a prior employer.

In addition to the topics required by the Budget Bill, employer training must also address sexual harassment as defined by the New York City Human Rights Law ("NYCHRL"), and include information about the New York City Commission on Human Rights' ("NYCHR") complaint process. An employer who is subject to training requirements in multiple jurisdictions may provide proof of compliance with the New York City law, as long as the employer's sexual harassment training is provided annually and contains the mandated training areas discussed under the law. Employers will also be required to maintain records of employee training, including signed employee training acknowledgements presumably to provide to the NYCHR in the event of an investigation.

In addition to imposing training requirements, the Stop Sexual Harassment in New York City Act also requires all NYC employers to post an anti-sexual harassment rights and responsibilities poster. Employers also must provide an information sheet on sexual harassment to each employee at the time of hire. The poster and information sheet will be prepared by the NYCHR.

The new law expands the coverage of the NYCHRL – Currently, the NYCHRL covers employers with four (4) or more employees. Pursuant to the new law, with respect to sexual harassment claims, the scope of the NYCHRL will be expanded to cover all employers, regardless of the number of employees.

The new law extends the statute of limitations for filing sexual harassment claims – Currently, aggrieved individuals must file a complaint with the NYCHR within one (1) year of the alleged discriminatory practice. The new law extends this limitation period to three (3) years in cases of sexual harassment.

The Budget Bill and the Stop Sexual Harassment in New York City Act demonstrate the State and City's commitment to combating sexual harassment in the wake of the #MeToo movement. Accordingly, to keep abreast of these important legislative changes, employers must rapidly re-evaluate their sexual harassment and training programs to ensure that they comply with the new requirements imposed by these new laws.

For more information about the new legislation, or this alert, please contact Keith Gutstein or Aaron Solomon by email at kgutstein@kaufmandolowich.com, asolomon@kaufmandolowich.com, or by phone at (516) 681-1100, or any member of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group.