

An Employer's Guide to New Federal, New York State and New York City Sexual Harassment Legislation

May 08, 2018

Client Advisory

May 8, 2018 by Jeffrey S. Boxer, Judith A. Lockhart and Elaine Nguyen

As the #MeToo movement continues to attract nationwide attention, new federal, New York State and New York City laws are addressing sexual harassment in the workplace.

Federal Legislation: The Tax Cuts and Jobs Act

The Tax Cuts and Jobs Act of 2017 signed into law by President Donald J. Trump has significant implications for the settlement of sexual harassment claims. Beginning with the 2018 tax year, the new law prohibits employers from deducting any settlement or payout related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement. The statute also prohibits deductions for attorney's fees related to any such settlement or payment. Employers can continue to deduct payments for settlements of sexual harassment or abuse claims if the payment or settlement is not subject to a nondisclosure agreement. Employers also can continue to deduct payments for settlements of any other type of claim other than for sexual harassment or sexual abuse regardless of whether the settlement is subject to a nondisclosure agreement. The new provision is generally applicable to all employers nationwide except for members of Congress, tax-exempt organizations, and individuals.

The new provision poses significant unanswered questions. For instance, it is unclear if an entire settlement amount is non-deductible if a sexual harassment claim is brought with other claims, if allocation is allowed for those claims, or if allocation is allowed for a portion of attorneys' fees related to sexual harassment claims. The IRS is expected to issue some guidance to clarify the new provision's ambiguities, but employers should not wait for that guidance and should develop plans for sexual harassment settlements now since this new law applies to settlement payments made after December 22, 2017.

New York State Legislation: The New York State 2019 Budget Bill

On April 12, 2018, Governor Andrew Cuomo signed the New York State 2019 Budget Bill containing significant provisions relating to workplace sexual harassment claims. The new state law applies to every New York State employer.

Prohibition of Arbitration Clauses in Sexual Harassment Suits

The new state law prohibits employers from requiring employees to arbitrate claims of sexual harassment in written contracts entered into on or after July 11, 2018, except where "inconsistent with federal law." Without this exception, the statute would bar any contract that requires arbitration of sexual harassment claims. Federal arbitration law, however, currently permits arbitration of sexual harassment claims and generally preempts state law in this area. Thus arbitration clauses should generally remain enforceable in New York. Several members of Congress are

sponsoring federal legislation that, if enacted, would moot this preemption argument and allow states like New York to bar arbitration of sexual harassment claims.

Prohibition of NDAs in Sexual Harassment Settlements

The new state law also prohibits nondisclosure provisions in sexual harassment settlement agreements that would prevent the disclosure of the underlying facts and circumstances of the claim unless the nondisclosure provision is requested by the claimant. If a claimant prefers to include a nondisclosure provision, then he or she must be given 21 days to consider the provision and can revoke the agreement for seven days after executing the agreement if he or she changes his or her mind. This provision applies to settlements entered into on or after July 11, 2018.

Implementation of Sexual Harassment Training and Policies

The New York State Department of Labor will issue a model sexual harassment prevention policy and an interactive model sexual harassment prevention training program. Employers in New York will be required to adopt the state's model policy or implement their own sexual harassment prevention policies that equal or exceed the minimum standards in the model policy. Employers in New York also will need to provide sexual harassment prevention training to employees annually. Employers will be required to either implement the state's model training program or establish their own training programs that meet or exceed the state model's minimum standards. This law will take effect on October 9, 2018.

Sexual Harassment Relating to Non-Employees

The new state legislation makes it an unlawful discriminatory practice for an employer to permit the sexual harassment of a non-employee who provides services pursuant to a contract in its workplace, including independent contractors, freelancers, or vendors. In other words, employers will now have liability for sex-based harassment experienced by non-employees who provide services on a contract-basis. This expansion of protection to non-employees is effective immediately.

New York City Legislation: "Stop Sexual Harassment in NYC Act"

On April 11, 2018, the New York City Council passed legislation relating to sexual harassment in the workplace that applies to the City and to private employers in the City. Mayor Bill de Blasio held public hearings on the proposed legislation on April 30, 2018 and is expected to sign it into law shortly. The law is expected to go into effect upon the Mayor's signature.

Statute of Limitations Relating to Sexual Harassment

The City Council legislation extends the statute of limitations for employees to file gender-based harassment claims under the New York City Human Rights law ("NYCHRL") with the City Human Rights Commission from one year to three years.

NYCHRL Prohibition to Apply to All Employers

The NYCHRL's prohibition of gender-based harassment currently applies to employers with four or more employees. The new legislation would eliminate this limitation so that the gender-based harassment provisions apply to all employers in New York City regardless of size.

Annual Anti-Sexual Harassment Training

After April 1, 2019, the new legislation will require employers with 15 or more employees to provide "annual interactive anti-sexual harassment training" for all their New York City employees who work more than 80 hours in year. The Human Rights Commission is tasked with developing a model online interactive training module that employers can use. Employers must keep records of all training sessions for at least three years, including signed employee acknowledgements.

Anti-Sexual Harassment Rights and Responsibilities Poster & Information Sheet

The new law will require all employers in New York City to conspicuously display anti-sexual harassment rights and responsibilities posters that will be disseminated by the Human Rights Commission in employee break rooms or other common areas where employees gather. Employers also must provide each new employee with an information sheet about sexual harassment upon hiring.

What Employers Should Do

- Employers should work with counsel to develop a plan on how to settle sexual harassment claims in light of the new federal tax law and the interplay with New York State and City laws. Employers should carefully consider and evaluate the costs and benefits of confidentiality of such settlements.
- Employers should ensure that settlements of sexual harassment claims in New York that are entered into after July 11, 2018 do not have nondisclosure provisions unless sought by the claimant. Employers also should be aware that claimants are entitled to a review period before and after executing of a sexual harassment settlement containing a confidentiality provision.
- Employers in New York State and New York City should ensure that their sexual harassment prevention policies meet the minimum standards required by the state or city. Employers without sexual harassment prevention policies should implement them.
- Employers in New York State and New York City should conduct annual interactive training programs addressing sexual harassment. Employers must ensure that these programs meet the minimum standards as outlined in the State or City law.
- Employers should require employees to sign acknowledgements that they conducted annual sexual harassment training sessions and should maintain records of all sexual harassment training programs.
- Employers should ask new hires if they have received anti-sexual harassment training to determine whether additional training is required for the new employee. Alternatively, Employers can consider requiring anti-sexual harassment training upon hiring.
- Employers in New York City should conspicuously display Anti-Sexual Harassment Rights and Responsibility posters.
- Employers in New York City should ensure that an Anti-Sexual Harassment Rights and Responsibility information sheet is distributed to new employees upon hiring.

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