KASOWITZ BENSON TORRES

Additional Guidance for Employers Regarding New York's Anti-Sexual Harassment Legislation

Earlier this year, New York State and New York City adopted comprehensive anti-sexual harassment legislation that imposed significant new obligations on New York employers. Our prior client alert detailing these changes can be found here. Both New York State and the New York City Commission on Human Rights (the "Commission") have now issued additional guidance for complying with the requirements of the new laws. This article provides New York employers with an overview of their obligations and upcoming deadlines.

REQUIREMENTS FOR ALL NEW YORK EMPLOYERS

On August 24, 2018, New York State launched a new anti-sexual harassment website and published additional guidance for complying with the new anti-sexual harassment legislation. Key deadlines and requirements impacting private sector employers are below.

Sexual Harassment Policy and Training Requirements

As of **October 9, 2018**, all New York employers must:

- **Provide their employees with an updated written sexual harassment prevention policy**. To comply with this requirement, employers may adopt the model sexual harassment prevention policy and model complaint form developed by the New York Department of Labor ("DOL") and the New York State Division of Human of Rights ("DHR").[1] Any employer that does not adopt the model policy and complaint form must establish its own policies that equal or exceed the minimum standards required by law.

- **Begin to provide annual interactive[2] sexual harassment prevention training to all of their employees, including temporary and transient employees and interns**. The DOL and DHR have issued model training materials that employers may use to comply with this requirement. Any employer that does not adopt the model training program must produce its own materials that equal or exceed the minimum standards required by law.

  Employers must complete training of their current employees by **October 9, 2019**. All new hires must be trained as quickly as possible after hire.

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[1] These documents, along with the other model materials referenced in this alert, are available on the New York State anti-sexual harassment website located here.

[2] A training is defined as "interactive" if the training: (i) is web-based with questions asked of employees as part of the program; (ii) accommodates questions asked by employees; (iii) includes a live trainer made available during the session to answer questions; or (iv) requires feedback from employees about the training and the materials presented.

Following the initial training, all employees must be trained annually. The annual training may be based on the calendar year, anniversary of an employee's start date, or another date chosen by the employer.

Please note that the newly developed model policy and training program relate only to an employer's sexual harassment prevention requirements under New York *state* law; New York City employers have additional obligations and training requirements discussed below.

Additional Guidance Regarding Non-Disclosure Agreements

The website's Frequently Asked Questions ("FAQs") provide employers with further guidance to comply with the new legislation's constraints on non-disclosure agreements in sexual harassment cases.

As of **July 11, 2018**, employers are prohibited from including non-disclosure clauses in agreements resolving claims of sexual harassment unless their inclusion is the settling claimant's "preference." The FAQs detail the process for memorializing the claimant's preference for confidentiality, including two separate agreements providing for non-disclosure. This dual agreement requirement is not expressly required by the text of the law, but the FAQs direct employers to follow the below process for memorializing the claimant's preference:

1. Any such term or condition of confidentiality ("Confidentiality Clause") must be provided to all parties, and the claimant shall have 21 days to consider it. (Employers may initiate the process by suggesting the Confidentiality Clause.) This 21-day period cannot be waived.

2. If, after 21 days, the claimant chooses to include the Confidentiality Clause, then that preference to include the Confidentiality Clause shall be memorialized in a standalone agreement signed by all parties.

3. For a period of 7 days following the execution of the standalone agreement containing the Confidentiality Clause, the claimant may revoke the standalone agreement. The standalone agreement shall not become effective or be enforceable until such revocation period has expired.

4. If the claimant has not revoked the standalone agreement, the employer may incorporate the Confidentiality Clause into the parties' larger settlement agreement for resolution of the claim.

Given that this procedure is not codified in the new statute, employers may want to discuss alternative approaches with employment counsel.

UPCOMING DEADLINES UNDER THE NEW YORK CITY ACT

In addition to the above requirements, New York City employers must implement the following:

- As of **September 6, 2018**: All New York City employers **must**:
    - Conspicuously display a legal-size anti-sexual harassment poster designed by the Commission in both English and Spanish. The English-langue poster is available

here. The Spanish-language poster is available here.

- Provide new hires with an anti-sexual harassment "factsheet." The "factsheet" is available here. As an alternative, New York City employers may incorporate the same information in their employee handbooks so long as the handbooks are provided to new hires on the first day of employment.

- As of **April 1, 2019**: New York City employers with at least 15 employees **must**:

  - Include the following additional topics in their interactive sexual harassment prevention training: (i) an explanation of sexual harassment and retaliation as a form of unlawful discrimination under local law and examples thereof; (ii) the complaint process available through the EEOC, the DHR and the Commission, including contact information for all three agencies; (iii) information concerning bystander intervention, including resources that explain how to engage in it; and (iv) the specific responsibilities of supervisory and managerial employees in preventing sexual harassment and retaliation. New York City employers are required to maintain records of the training, including signed employee acknowledgments, for three years.

The Commission will issue a model training program that employers may use to satisfy their requirements under the New York City law; it remains to be seen whether the Commission's training program will materially differ from the training program published by the DOL and DHR on the New York state website. Any employer that chooses to use the Commission's model program will need to separately train employees regarding its internal compliance process.

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Attorneys at Kasowitz Benson Torres LLP have extensive experience in providing clients with sexual harassment prevention training for their employees and in assisting them with their sexual harassment prevention policies and procedures. If you would like to discuss these issues, please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789).