Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

Uncharted Territory for Tristate Employers: Part 2 – New York

While New Jersey is still debating the format of a new bill to address confidentiality in settlement agreements as a response to the MeToo movement, as we discussed in our May Alert, lawmakers in New York State and New York City have already passed bills to address sexual harassment in the workplace. Both the State and City have taken strong measures that require action on the part of covered employers and change the legal landscape as to how these types of harassment claims are handled.

Statewide Reforms

In the 2019 New York budget, signed into law by Governor Cuomo on April 12, 2018, state legislators included sweeping reforms to the law's treatment of sexual harassment claims asserted by employees. The provisions of the law are aimed at addressing root causes of sexual harassment in the workplace by ensuring that the workforce is properly educated on its prevention. In addition, the law prohibits commonly used contractual and remedial measures that the legislature views as perpetuating the culture of harassment. The following reforms affect private employers operating within New York State:

- **Ban on Certain Contractual Provisions**
  The law addresses two contractual provisions that are commonly used by employers to minimize exposure for claims of sexual harassment. First, the law prohibits enforcement of any contractual provision requiring that allegations or claims of sexual harassment be submitted to mandatory arbitration for resolution.

Specifically, the law forbids including such mandatory arbitration clauses in any agreement, and nullifies any existing mandatory arbitration clause that would apply to allegations or claims of sexual harassment. Importantly, the nullification of mandatory arbitration clauses does not affect the enforceability of the rest of the agreement.

Additionally, lawmakers have banned the use of non-disclosure/confidentiality language in any settlement or agreement that seeks to resolve claims of sexual harassment. This prohibition comes with an important caveat; namely, agreements may contain non-disclosure/confidentiality provisions if the inclusion of such provision is the preference of the individual that made the complaint of sexual harassment. In such cases, complainants are entitled to twenty-one (21) days to consider any such provision, and a seven (7) day revocation period after agreeing to the non-disclosure/confidentiality restrictions, as is required for releases under the Older Worker Benefit Protection Act. Beyond providing complainants with a consideration period and revocation period, the law does not specify how the "complainant's preference" would be evidenced or, indeed, how it would differentiate from previously agreeing to an employer's request for confidentiality.

These prohibitions become effective on July 11, 2018.

» **Mandatory Policies and Training**

The law also requires employers to act internally to ensure that their employees are educated about how to prevent, identify, and address sexual harassment. As part of these precautions, all employers are required to adopt a model sexual harassment prevention policy promulgated by the State or establish a policy that equals or exceeds the minimum standards. The model policy will include information regarding state and local law, administrative and judicial remedies, procedures for timely and confidential internal investigations, and a standard complaint form for sexual harassment allegations. Further, every employer will be required to implement a sexual harassment prevention training program either promulgated by the State or which equals or exceeds the minimum standards. Such training is required on an annual basis.

These requirements go into effect on October 9, 2018. We will send out an update to this alert once the form is available. Importantly, employers will not be required to begin the annual training until the requirements are in effect.

» **Liability to Non-Employees**

Lawmakers have also expanded the definition of "unlawful discriminatory harassment" to cover employers' obligations to certain non-employees,

including contractors, subcontractors, vendors, consultants, or any of their employees, or to any other person "providing services pursuant to a contract in the workplace." An employer will now be liable to such non-employees who suffer sexual harassment in its workplace, where the employer knew or should have known that they were subject to such harassment and failed to take immediate and appropriate corrective action.

These amendments were immediately effective upon their passage.

City Reforms

Not to be outdone, on April 11, 2018, the New York City Council passed a series of bills entitled the "Stop Sexual Harassment in NYC Act" that seek to prevent incidents of workplace sexual harassment. These bills were signed into law by Mayor de Blasio on May 9, 2018. The following are major provisions affecting those employers operating within the City of New York:

» **Notice Requirements**

In addition to being required to comply with the State's new training and policy provisions, all employers operating within the City must display a poster advising employees of all anti-sexual harassment rights and responsibilities, to be designed by the Commission on Human Rights. The poster will include information on identifying sexual harassment, the complaint process, and how to contact the Commission or EEOC.

The requirement to post these notices takes effect on September 6, 2018. We will send out an update to this alert once the form is available.

» **Mandatory Training**

The City has implemented its own training requirements, mandating that all employers with fifteen (15) or more employees must provide annual anti-sexual harassment interactive training to all full-time or part-time employees within ninety (90) days of their hire. However, the new code also provides that the Commission will provide a free training module for employers to use. The code also provides that these training requirements should be seen as a "minimum threshold," and does not discourage further or more frequent training. The employer must keep track of records of compliance for at least three years, to make available to the Commission upon request.

These requirements become effective on April 1, 2019. Similar to the state-wide training requirement, employers will not be required to commence training before this effective date.

» **Expansion of Rights**

The Act amended the City's administrative code on Civil Rights by carving out special protections for individuals who experience gender-based harassment. Prior to this amendment, the administrative code defined "employer" as an individual or entity that employs five or more employees. However, the Act amended this provision to specify that, where there is a claim for unlawful discriminatory practices based on gender-based harassment, the term "employer" will not be limited by size.

This amendment took effect immediately upon passage.

Employer Tips

New York and New York City based employers of all sizes need to be aware of the new requirements and prohibitions with regard to sexual harassment. Specifically, certain policies and procedures must be implemented immediately and covered employers must determine how best to train their workforces to prevent, identify, and remedy sexual harassment and other gender-based discriminatory practices. Any attempts to keep such claims confidential will be invalidated unless the claimant expressly wishes to maintain confidentiality, and employment agreements and internal policies will need to be reviewed for any mandatory arbitration clauses that will be invalidated.

Employers operating within New York City will be subject to two separate sets of requirements regarding notice, training, and internal procedures, and as always, be required to meet the more onerous requirements. As the relevant agencies are still in the process of formulating these requirements, any discrepancies will need to be addressed at a later date.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in drafting policies and answering questions about these new requirements for employers located in New York and New York City.

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