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## Advocate's View

# Update your sexual harassment policy and training to comply with new state employment laws

Over the past year, the New York State Legislature has passed a flurry of new laws requiring employers to update their employment discrimination policies and provide additional training. The new requirements generally apply to all employers in the state with one or more employees (a change to some discrimination statutes, which previously applied to employers with four or more employees). Several of these bills have already been signed into law. One transformative bill, passed by the state Assembly and Senate on June 19, 2019, will dramatically alter the state's employment laws in the coming months, with Gov. Andrew Cuomo having indicated his intent to sign the bill shortly.

This list provides a summary of recommended directives to allow you and your clients to make sense of the new legislation and ensure that you are on a path to timely compliance.

1. Update and distribute sexual harassment policy

Under the existing law, all employers in New York state must have a written sexual harassment prevention policy. (Labor Law § 201-g.) This provision went into effect on Oct. 9, 2018. Generally, your policy must prohibit sexual harassment, provide examples of harassment, and include information regarding remedies available, a standard complaint form, and a procedure for reporting and investigation of complaints. The New York state Department of Labor issued a model sexual harassment prevention policy containing the statutory requirements on its website.

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Your sexual harassment policy must be provided to every employee in writing, and must be publicly available and posted on the websites of the New York State Department of Labor and the Division of Human Rights.

The new June 19, 2019 bill provides additional requirements for the dissemination of this policy. Your written sexual harassment policy will need to be distributed to all employees in English and the primary language of the employee (translations are available online in Spanish, Chinese, Korean, Russian, Italian, Polish and Haitian-Creole); and must be distributed to each employee at the time of hiring and again at every annual sexual harassment prevention training (explained below).

2. Schedule sexual harassment training and prepare materials to distribute

Under the Oct. 9, 2018 law (Labor Law § 201-g), every employer in New York state is also required to provide its employees with annual training on how to prevent sexual harassment. The first annual training must be completed on or before Oct. 9, 2019 (the anniversary of the effective-date of the statute). The New York State Department of Labor has developed a model training program, complete with a PowerPoint presentation and video for use during the training, which can all be found on its website.

The June 19, 2019 bill will amend Labor Law § 201-g, with several additional requirements for the sexual harassment training presentation. Like the sexual harassment policy, the training materials must also be provided to employees in writing in English and the language identified by each employee as their primary language, and must be provided at the time of hiring and during the annual training program.

Generally, employers are required to pay employees for time spent attending the required sexual harassment training. See 29 CFR §§ 785.27-785.32.

An employer's failure to comply with the sexual harassment policy and training requirements carries stiff penalties. Noncompliance subjects the employer to a civil penalty issued by the state of between $1,000 and $20,000, plus liquidated damag-

es of up to $20,000 payable to each affected employee. (NY Labor Law § 215(b).) Separately, an employee may bring a civil action against the employer for violations of these requirements, and may be awarded liquidated damages of up to $20,000 plus attorney's fees. Id.

The statute also prohibits retaliation against an employee for making a complaint, either to the employer or to the State, alleging that the employer is not in compliance with its sexual harassment policy obligations, regardless of whether the employer actually committed a violation. Id. Retaliation will subject the employer to the same penalties and civil liabilities stated above, and in addition any employer or person who retaliates against an employee is guilty of a class B misdemeanor. Id.

3. Educate employees involved in recruiting, interviews and hiring

All persons who are involved in the company's recruiting and hiring process should be informed of additional new requirements related to your anti-discrimination policies.

One new law prohibits employers from inquiring about the salary history of a job applicant or current employee, in an attempt by the state to reduce gender and racial pay disparities. (Labor Law § 194-a.) No employer may request wage or salary history of a job applicant or current employee, or use wage or salary history to determine the wages or salary for any job applicant. The new statute prohibits retaliation against an employee for alleging a violation of this section, and provides for a right of civil action for compensation of damages plus attorney's fees to a prevailing plaintiff. This law will become effective Jan. 6, 2020.

Another change is that employers are statutorily prohibited from discriminating based on hairstyle. This provision, signed into law and effective as of July 12, 2019, states that the term "race" for purposes of the state's employment discrimination statute (the Human Rights Law) now includes "traits historically associated with race, including but not limited to, hair texture and protective hairstyles," specifically including "braids, locks, and twists." (Exec. Law § 292(37) and (38).) This means that an employer cannot take any adverse action — including refusing to hire, promote or terminate employment — and cannot harass an employee for having a particular hair texture or hairstyle or prohibit an employee from wearing those hairstyles.

The above-referenced June 19, 2019 bill will significantly expand the definition of harassment based on a protected class (race, age, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or in retaliation for asserting a complaint of discrimination). Under prior caselaw, only harassment considered "severe or pervasive" was actionable under the Human Rights Law. The new bill states that harassment is unlawful regardless of whether it is "severe or pervasive." (Exec. Law § 296(h).) Instead, the employer may as a defense prove that "harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." Id. This significantly reduces the bar for employees alleging workplace harassment, and will go into effect 180 days after the legislation is signed by the governor.

The referenced bill will also expand the Human Rights Law to apply to all unlawful discrimination (not just sexual harassment as under the existing law) against non-employees, including contractors, subcontractors, vendors, and consultants. (As amended NY Executive Law § 296-d.) This will take effect 60 days after the legislation is signed by the governor.

Additionally, the bill will make it unlawful to include a nondisclosure (confidentiality) provision into a settlement agreement to resolve any type of employment discrimination or harassment claim (not just sexual harassment as per the existing law), unless the inclusion of the confidentiality provision is the employee's preference. (Amendment to CPLR 5003-b.) Mandatory arbitration clauses will also be prohibited with respect to any claim of discrimination (rather than only sexual harassment as in existing law). (Amendment to CPLR 7515.) (Note that the Southern District recently ruled that CPLR 7515's prohibition of mandatory arbitration clauses concerning sexual harassment claims is preempted by the Federal Arbitration Act and thus invalid. See Latif v. Morgan Stanley & Co. LLC, No. 18cv11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019).)

4. Update job applications, job descriptions and employee handbooks

All pertinent documents should be reviewed and updated to the extent that they conflict with the new employment laws. For example, job applications should be revised to delete any request for salary information, and job descriptions should be modified to the extent that particular hairstyles are required.

Additionally, employee handbooks and other policies may require revisions, including verbiage concerning the definition of sexual harassment and your sexual harassment policy.

A number of these new requirements have not yet gone into effect. Now is the perfect time to start updating policies and educating your staff to ensure that you will be in compliance when the additional revised statutes become effective over the next several months.

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