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Wave of New Sexual Harassment Laws Only Beginning

In the wake of the #MeToo movement, federal, state and local lawmakers continue to enact and propose a network of legal reforms and mandates regulating employer workplace sexual harassment prevention and response. Reforms have been proposed and/or passed at a rapid pace.

Recently passed reforms in New York State and New York City provide a road map for laws to come in many other jurisdictions. Key aspects of the New York reforms include:

- Rights expanded under existing law. The New York State Human Rights Law now extends anti-harassment protection to nonemployees, including contractors, subcontractors, vendors, consultants and others who provide services under a contract. The New York City Human Rights Law now covers all employers, not just those with four or more employees, and employees now have three years to file a complaint with the New York City Human Rights Commission.

- Nondisclosure agreements prohibited. For New York employers, effective July 11, 2018, nondisclosure provisions in sexual harassment settlement agreements are prohibited unless: (a) the employee prefers inclusion; and (b) the agreement provides the employee 21 days to consider the provision and 7 days to revoke after signature.

- Mandatory arbitration agreements void. Effective July 11, 2018, New York law renders void provisions of agreements requiring the submission of sexual harassment claims to mandatory binding arbitration (even if entered into prior to the effective date of the law), with the exception of collective bargaining agreements. However, it remains to be seen whether this prohibition ultimately will be enforceable or instead found to be pre-empted by the Federal Arbitration Act. Notably, while similar legislation has been proposed at the federal level, arbitration of employment disputes remains an evolving issue under federal law. Today, the U.S. Supreme Court in Epic Systems Corp. v. Lewis (https://www.stradley.com/~/media/Files/Publications/2018/05/EPICSystemsCorpvLewis%20pdf.pdf) ruled that employers could require employees to waive their right to join class or collective actions in favor of one-on-one arbitration of employment disputes.

- Comprehensive anti-harassment policies and posters required. By Oct. 9, 2018, all New York employers (regardless of size) must adopt and distribute a written sexual harassment policy that is compliant with state requirements. The state intends to publish a model policy in the future, but any employer policy must at a minimum (a) include a model complaint form; (b) prohibit sexual harassment, and provide examples of prohibited conduct; (c) include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties; (d) include information concerning federal and state laws on sexual harassment and remedies available to victims and state that there may be applicable local laws; (e) inform employees of rights and redress available to them and of all forums where disputes can be adjudicated; and (f) state that

sexual harassment is a form of employee misconduct and sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and management personnel who knowingly allow such behavior to continue and that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful. Additional notice poster requirements apply to New York City employers.

- Employee training mandatory. Also by Oct. 9, 2018, all New York employers, regardless of size, must conduct annual sexual harassment training for all employees. The training must be interactive and include (a) an explanation of sexual harassment; (b) examples of conduct that would constitute unlawful sexual harassment; (c) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims; and (d) information concerning employees' right of redress and all available forums for adjudicating complaints. The state will publish and develop a model sexual harassment prevention training program. Likewise, New York City employers with 15 or more employees must also conduct yearly interactive sexual harassment trainings meeting the city's requirements (including training within 90 days of hire and separate manager training), although the city training requirement is not effective until April 1, 2019.

- Additional obligations for government agencies and contractors. New York's new laws also impose additional obligations on government agencies and contractors with regard to reporting, training and other anti-harassment measures.

New York is not alone. A sampling of just a few of the proposed and enacted reforms in other states/cities includes:

- Pennsylvania's governor announced a series of proposed legal and regulatory reforms (https://www.governor.pa.gov/gov-wolf-legislative-democrats-announce-sexual-harassment-discrimination-protections-workers/) and launched a website how-to (https://www.pa.gov/guides/reporting-workplace-sexual-harassment-in-pennsylvania/) guide for employees regarding identifying, reporting and filing complaints about sexual harassment.

- D.C. and Philadelphia now mandate sexual harassment training for all city employees.

- Chicago passed a "Hands Off; Pants On" ordinance to protect hospitality workers and added policy requirements for city contractors; more regulation of private employers is proposed.

- Many jurisdictions, including New Jersey, have pending laws that would prohibit nondisclosure agreements in sexual harassment settlements.

- The federal tax code now disallows certain deductions for sexual harassment settlements or payments conditioned on a nondisclosure agreement.

- Stricter laws mandating equal pay regardless of gender and new laws banning inquiries into applicant salary history also have been passed or proposed in many jurisdictions for the purpose of curtailing gender-based wage gaps.

Employers everywhere should work closely with human resources professionals and legal counsel to monitor the legal reforms enacted in or coming to their worksite(s) and model their policies and practices accordingly.

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