

Empire State Update: New York State's and New York City's Expansive New Sexual Harassment Laws

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New York Governor Andrew Cuomo recently signed into law the [2018-2019 New York State budget](#), which includes components aimed at combating sexual harassment in the workplace that impose significant new obligations on private and public employers. The New York City Council similarly introduced the [Stop Sexual Harassment in NYC Act](#), which is also aimed at combating sexual harassment in the workplace and imposes substantial new obligations on most employers in New York City, in addition to the new New York State laws. Mayor Bill de Blasio signed the New York City legislation into law on May 9, 2018.

New York State Changes

Expansion of the New York Human Rights Law

Effective immediately, the New York Human Rights Law (NYHRL) prohibition against sexual harassment in the workplace applies to nonemployees, such as independent contractors, consultants, vendors, subcontractors, and persons providing services pursuant to a contract. An employer may be found liable “when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer’s workplace, and the employer failed to take immediate and appropriate corrective action.” In reviewing sexual harassment cases involving nonemployees, “the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of the harasser” will be considered.

Mandatory Arbitration Clauses (New York Civil Practice Law and Rules (CPLR) Section 7515)

Effective July 11, 2018, employers in New York State will be prohibited from requiring employees to sign agreements that require mandatory binding arbitration of claims relating to sexual harassment. Such clauses will be null and void as a matter of law but will be severed from the remaining provisions of the agreement. There are some important exceptions to this prohibition, including that it does not apply where it would be “inconsistent with federal law.” While it is unclear how New York courts will interpret this law, there is a strong argument that the Federal Arbitration Act (FAA) and the Supreme Court of the United States’ decisions in [Kindred Nursing Centers Limited Partnership v. Clark](#) and [AT&T Mobility LLC v. Concepcion](#) will preempt this New York law. In addition, the prohibition does not apply to mandatory arbitration provisions included in collective bargaining agreements.

Nondisclosure Agreements

Also effective July 11, 2018, employers in New York State will be prohibited from requiring nondisclosure clauses in any settlement, agreement, or other resolution of any claim, where “the factual foundation for which involves sexual harassment” unless the condition of confidentiality is the complainant or plaintiff’s preference. If such language is included, the complainant or plaintiff must have 21 days to consider such a term or condition, and his or her preference must be memorialized in an agreement signed by all parties. The complainant or plaintiff must then have at least seven days following the execution of such agreement to revoke the agreement. The nondisclosure clause will not become effective or enforceable until after the revocation period has expired.

Sexual Harassment Policy Requirements

Effective October 9, 2018, all employers in New York State will be required to adopt a sexual harassment prevention policy that equals or exceeds the minimum standards provided by a model sexual harassment policy that will be issued by the New York State Department of Labor (NYSDOL) in consultation with the New York State Division of Human Rights (NYSDHR). At a minimum, the model policy will include:

- ▶ a prohibition on sexual harassment, consistent with guidance that will be issued by the NYSDOL;
- ▶ examples of prohibited conduct that would constitute unlawful sexual harassment;
- ▶ “information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment”;
- ▶ a statement that there may be applicable local laws;
- ▶ a standard complaint form;
- ▶ a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- ▶ information on employees’ rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- ▶ a statement that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against (1) individuals engaging in sexual harassment and (2) supervisory and managerial personnel “who knowingly allow such behavior to continue”; and
- ▶ a statement that “retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.”

This model policy will be publicly available of the NYSDOL’s and NYSDHR’s website, and any policy adopted by the employer must be distributed to all employees in writing.

Sexual Harassment Training Requirements

Also effective October 9, 2018, all employers in New York State will be required to provide annual anti-harassment training to all employees. The NYSDOL, in consultation with the NYSDHR, will provide a model sexual harassment prevention

training program. Employers must adopt the model or implement a training program that equals or exceeds the minimum standards provided by the model training.

At a minimum, the model sexual harassment prevention training program will be interactive and will include:

- “an explanation of sexual harassment, consistent with guidance that will be issued by the NYSDOL”;
- examples of conduct that would constitute unlawful sexual harassment;
- “information concerning federal and state statutory provisions concerning sexual harassment”;
- details on remedies available to victims of sexual harassment;
- “information concerning employees’ rights of redress and all available forums for adjudicating complaints”; and
- information addressing “conduct by supervisors and any additional responsibilities for such supervisors.”

Public Bids

Effective January 1, 2019, where competitive bidding is required for certain state or public contracts, bids will need to contain a statement affirming that the bidding entity implemented a written policy addressing sexual harassment prevention and that it provides annual sexual harassment prevention training. The following statement must be subscribed and sworn to as true: “By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that the bidder has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of section two hundred one-g of the labor law.” Where competitive bidding is not required, state departments and agencies may, at their discretion, require the above certification.

New York City Changes

The New York City Council sent a package of 11 bills for Mayor de Blasio’s signature as part of the Stop Sexual Harassment in NYC Act. On May 9, 2018, Mayor de Blasio signed the laws into effect. Some of the new laws are applicable only to city agencies, city contractors, and city employees. However, other laws will impact most private employers in New York City and amend the New York City Human Rights Law (NYCHRL) and the New York City Charter. Employers in New York City should familiarize themselves with both New York State and New York City requirements, especially where the requirements between the two overlap.

Expansion of the NYCHRL ([Introduction \(Int\) 0657-2018](#), [Int 0663-2018](#), and [Int 0660-2018](#))

Effective immediately:

- the NYCHRL applies to all employers, regardless of the number of employees (under the previous law, the NYCHRL generally only applied to employers with four or more employees);

- the statute of limitations under the NYCHRL is extended for filing gender-based harassment claims from one year to three years; and
- the NYCHRL's policy statement is updated to declare that gender-based harassment is a form of discrimination that "threatens the terms, conditions and privileges of employment."

Posting and Notice Requirements ([Int 0614-2018](#) and [Int 0630-2018](#))

By August 7, 2018, the New York City Commission on Human Rights (NYCCHR) must conspicuously post on its website online resources about sexual harassment, including the following:

- an explanation that sexual harassment is a form of unlawful discrimination under New York City law;
- specific descriptions and examples of sexual harassment;
- information about the NYCCHR's complaint process and how to contact the NYCCHR;
- a list of other government agencies with which an individual can file complaints;
- an explanation of retaliation, "including . . . retaliation for complaints concerning allegations of sexual harassment . . . and examples of activities which may be retaliation for such complaints"; and
- information on bystander intervention education and importance of taking action to prevent workplace sexual harassment.

The NYCCHR must also post an interactive tool describing each step of the complaint process available through the NYCCHR—from when a complaint is filed to when a determination is made on such complaint.

In addition, effective September 6, 2018, all employers, regardless of size, "must conspicuously display an anti-sexual harassment rights and responsibilities poster," designed and published by the NYCCHR, in employee break rooms or other common areas where employees gather. The poster must be displayed in English and Spanish, and it must be "at least 8 1/2 by 14 inches with a minimum 12 point type"

The poster created by the NYCCHR will contain, at a minimum, the following:

- "an explanation of sexual harassment as a form of unlawful discrimination under local law";
- "a statement that sexual harassment is also a form of unlawful discrimination under state and federal law";
- "a description of sexual harassment, using examples";
- a description of the complaint process available through, and directions on how to contact, the NYCCHR, NYSDHR, and the U.S. Equal Employment Opportunity Commission (EEOC); and
- a prohibition against retaliation, pursuant to the NYCHRL.

Prior to the effective date, the NYCCHR will also publish an information sheet on sexual harassment that contains the above requirements that employers must distribute to individual employees at the time of hire.

Mandatory Anti-Sexual Harassment Training ([Int 0632-2018](#))

Effective April 1, 2019, private employers with 15 or more employees will be required to conduct annual anti-sexual harassment interactive training for all covered employees, including supervisors and managerial employees. Training will be required for “employees who work more than 80 hours in a calendar year who perform work on a full-time or part-time basis” within New York City after 90 days of initial hire. For purposes of this law, the term “employee” includes interns.

The training will need to be interactive, which is defined as “participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission.” However, the training will not be required to be live or in person in order to satisfy the requirements of the law.

The NYCCHR will create a model online interactive training module that an employer may (but is not required to) use to train its employees. At a minimum, any anti-sexual harassment interactive training used by a New York City employer will need to include:

- “[a]n explanation of sexual harassment as a form of unlawful discrimination under local law;
- [a] statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- [a] description of what sexual harassment is, using examples;
- [a]ny internal complaint process available to employees through their employer to address sexual harassment claims”;
- an explanation of the complaint process available through the NYCCHR, the NYSDHR and the EEOC, including the contact information of those entities;
- a prohibition on retaliation, pursuant to NYCHRL, and examples of such retaliation;
- “[i]nformation concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention”; and
- a description of “[t]he specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.”

Employers will be required to keep records of all trainings—including signed employee acknowledgments, which may be electronic—for at least three years. An employee who has received anti-sexual harassment training from one employer within the required training cycle will not be required to receive additional anti-sexual harassment training from another employer until the next cycle.

To the extent that both the NYSHRL and the NYCCHR will be developing and publishing model trainings, it is unclear how these two trainings will interact with one another.

In addition, [Int 0612-2018](#), [Int 0613-2018](#), [Int 0653-2018](#), [Int 0664-2018](#), and [Int 0693-2018](#) cover city agencies, city contractors, and city workers, and set forth additional requirements for such individuals and entities.

The Stop Sexual Harassment in NYC Act package also includes a resolution that calls upon the United States Congress to pass, and the president to sign, a law prohibiting predispute arbitration agreements from being valid or enforceable if they require arbitration of a sex discrimination dispute. This resolution is nonbinding but may inform future court decisions interpreting the arbitrability of NYCHRL claims.

How Should Employers Prepare?

To prepare for these changes in New York laws, employers should carefully review their current practices and should consider the following steps:

- ▶ Ensure that their sexual harassment policies meet the minimum standards set forth in the new laws
- ▶ Adopt annual sexual harassment trainings that meet the minimum standards set forth in the new laws and begin preparing to deliver this training to all employees
- ▶ Review all employment agreements and separation or settlement agreements to ensure any nondisclosure clauses meet the requirements of the new state law
- ▶ Monitor and review materials to be published by the NYSDHR and the NYCCHR to ensure compliance with their model policies and training programs
- ▶ Train and inform all employees involved with employee relations on the new requirements

Ogletree Deakins will continue to monitor developments on these state and local legislations and will post updates on the firm's [blog](#) as additional guidance becomes available.