COMPLIANCE BULLETIN

New York State Passes Strict Workplace Harassment Laws

HIGHLIGHTS

- Employers must adopt policies and training programs to prevent sexual harassment.
- Employers may be held liable for workplace sexual harassment of nonemployees.
- Sexual harassment claims may not be subject to mandatory arbitration or nondisclosure.

IMPORTANT DATES

April 12, 2018
Nonemployees may file sexual harassment claims against employers.

July 11, 2018
New prohibitions against arbitration and nondisclosure apply.

October 9, 2018
Employers must comply with written policy and training requirements.

Provided By:
Compass Consulting Group

OVERVIEW

Effective Oct. 9, 2018, all employers in New York state must adopt a written policy and conduct annual employee training on sexual harassment in the workplace. These requirements were enacted as part of the state's 2019 budget on April 12, 2018.

The law also prohibits employers from requiring arbitration to resolve sexual harassment claims under a written contract and from making confidentiality a condition of settlement for sexual harassment claims, **effective July 11, 2018**.

Finally, the law allows nonemployees, such as contractors or vendors, to hold an employer liable for sexual harassment in the employer's workplace, **effective immediately**.

ACTION STEPS

New York employers should become familiar with the new requirements and review their sexual harassment policies and training programs, or begin developing them, to ensure compliance. Employers should also watch for future guidance from the state's Department of Labor and Human Rights Division.

COMPASS CONSULTING GROUP

Overview

New York's 2019 budget law, enacted on April 12, 2018, amended several of the state's labor and other employment-related laws to provide increased protections against sexual harassment in the workplace.

Effective **April 12, 2018**, the amendments **extend** the right to file sexual harassment claims to nonemployees. Previously, only employees could file these claims against an employer.

Effective **July 11, 2018**, the amendments **prohibit** employers from including any:

- ✓ Nondisclosure requirements within any settlement or other agreement to resolve a sexual harassment claim, unless the complainant prefers to include one; or
- ✓ Mandatory arbitration requirements for sexual harassment claims within any written contract.

Effective **Oct. 9, 2018**, the amendments **require** every employer in the state to:

- ✓ Adopt a written sexual harassment prevention policy;
- ✓ Distribute the written policy to employees; and
- ✓ Conduct annual sexual harassment prevention training for employees.

The amendments also include additional new requirements for employers that submit bids to the state or to any of its departments or agencies. Within each bid submitted on or after **Jan. 1, 2019**, these employers must certify that they are in compliance with the law's new written policy and annual training requirements.

Written Policy and Training Requirements

The budget law directs the New York Department of Labor (NYDOL) to develop a model written policy and a model training program. Once these are available, employers may adopt them as their own to comply with the law. Employers may also adopt different policies and programs, as long as they meet or exceed the standards set forth in the NYDOL's forthcoming models.

At minimum, the law requires an employer's **written policy** to include:

- ✓ A statement that sexual harassment is prohibited and examples of prohibited conduct that would constitute unlawful sexual harassment;
- ✓ Information about federal and state statutory provisions relating to sexual harassment and remedies available to victims of sexual harassment, along with a statement that there may be applicable local laws;
- ✓ A standard complaint form;
- ✓ A procedure for timely and confidential investigation of complaints that ensures due process for all parties;

- Information about employees' rights of redress and all available forums for adjudicating complaints;
- A clear statement that sexual harassment is a form of employee misconduct and that sanctions will be enforced against both those who engage in sexual harassment and any supervisory and managerial personnel who knowingly allow it to continue; and
- A clear statement that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The law's minimum requirements for an employer's **sexual harassment prevention training program** are that it must be **interactive** and include:

- An explanation of sexual harassment and examples of conduct that would be unlawful;
- Information about federal and state statutory provisions relating to sexual harassment and remedies available to victims;
- Information about employees' rights of redress and all available forums for adjudicating sexual harassment complaints; and
- Information about conduct by supervisors and additional responsibilities for supervisory personnel.

Prohibition Against Nondisclosure Conditions

Under the budget law, any settlement or other agreement to resolve a sexual harassment claim that an employer enters into **on or after July 11, 2018**, may not include any condition that prevents the parties from disclosing the underlying facts and circumstances of the claim, unless the complainant prefers to include one.

When a complainant prefers to include a nondisclosure condition, a 21-day waiting period will apply. If the complainant still prefers the condition after these 21 days, that preference must be memorialized in an agreement signed by all the parties. The complainant then has the right to revoke this agreement for at least seven days after it is executed, and the agreement does not become effective or enforceable until the revocation period expires.

Prohibition Against Mandatory Arbitration

Under the budget law, any written contract an employer enters into **on or after July 11, 2018**, may not require the parties to resolve sexual harassment claims through mandatory arbitration as a condition of the contract's enforcement or of the parties' abilities to obtain remedies under the contract.

Mandatory arbitration means that the parties must submit disputes to arbitration before commencing any legal action to enforce the contract and that the arbitrator's findings or determinations will be considered final and not subject to independent court review. Under most circumstances, the new law will render any mandatory arbitration clause for sexual harassment claims **null and void** while allowing other portions of a contract to remain enforceable.

A contractual mandatory arbitration clause for sexual harassment claims may still be enforceable if excluding it would be inconsistent with federal law or with the terms of a collective bargaining agreement. In addition, claims that do not involve sexual harassment may still be subject to mandatory arbitration under any written contract.

Nonemployee Claims

New York's Human Rights Law prohibits employers from discriminating against individuals in the terms of employment based on sex, which includes sexual harassment. **As of April 12, 2018**, the budget law amended the Human Rights Law to add a **prohibition against allowing sexual harassment of nonemployees** in an employer's workplace.

Specifically, the Human Rights Law now permits **contractors, subcontractors, vendors, consultants, their employees and any other person providing services under a contract in an employer's workplace** to file sexual harassment claims against the employer. An employer may be held liable for a nonemployee's sexual harassment claim if:

- ✓ The employer (or its agents or supervisors) knew or should have known that the nonemployee was subjected to sexual harassment in the employer's workplace; and
- ✓ The employer failed to take immediate and appropriate corrective action.

Considerations for Employers

In addition to the state budget law's new requirements, a local law enacted by the New York City Council on April 11, 2018, requires **employers in New York City that have 15 or more employees** to provide sexual harassment training to each new employee after 90 days of employment and to all employees on an annual basis. Once the law is signed by the mayor, these and related requirements under the city's new Stop Sexual Harassment in New York City Act will go into effect on **April 1, 2019**. Employers should become familiar with all applicable state and local laws to ensure that their sexual harassment prevention policies, training programs and other workplace policies comply with all requirements by the appropriate deadlines.

As noted above, the amendments made by the state's 2019 budget require all employers in the state to adopt the NYDOL's model or an equivalent, sexual harassment prevention policy and training program as of Oct. 9, 2018. Although the NYDOL has not indicated exactly when employers may expect these models to be released, the law requires both the NYDOL and the state's Division of Human Rights to make the model written policy available on their websites. Therefore, employers should monitor these agencies' websites for additional guidance.