

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED MEMORANDUM

DATE: April 24, 2018

TO: New York Clients

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: Governor Cuomo Signs into Law New York State Budget Anti-Harassment Provisions and the NYC Council Passes the “Stop Sexual Harassment Act”

On April 12, 2018, Governor Cuomo signed into law the New York State budget, which includes several significant laws regarding harassment in the workplace. One day earlier, on April 11, 2018, the New York City Council passed a series of legislation known as the “Stop Sexual Harassment Act”, which strengthens the City’s laws against harassment in the workplace. Mayor de Blasio is expected to sign the legislation into law in the coming weeks.

New York State Budget Anti-Harassment Provisions

Key provisions of the State’s budget amend existing State laws that apply to both government and private employers. While state discrimination laws apply to private employers with four or more employees, sexual harassment laws apply to all private employers:

1. Employer Obligation Over Non-Employees: **Effective immediately**, it is an unlawful discriminatory practice if an employer permits sexual harassment in the workplace against non-employees, including sub-contractors, vendors, consultants, and other persons providing services pursuant to a contract if the employer knows or should know that such individuals are subjected to harassment in the workplace and the employer fails to take immediate corrective action.
2. Employment Arbitration Clauses: **Effective July 11, 2018**, employment contracts can no longer contain a mandatory arbitration clause to resolve claims of sexual harassment, unless such clause is the result of a collective bargaining agreement. While it may be the intent of the legislation to protect victims who make claims of sexual harassment, practically speaking, the law also protects perpetrators because employers will have to update their employee contracts and handbooks at the outset, thus covering all employees, even those who may engage in harassing behavior.
3. Non-Disclosure Agreements: **Effective July 11, 2018**, settlement agreements can no longer contain non-disclosure provisions when the underlying claim is one of sexual

harassment unless the employee prefers the confidentiality provision, has twenty-one (21) days to consider it, and does not revoke the acceptance of such provision within seven (7) days after signing the agreement. The specific language in this rule refers to a “complainant’s” preference to a non-disclosure clause and so it may be that an employer can require a non-disclosure provision in a settlement agreement involving an employee who engages in harassing behavior.

4. **Mandatory Written Anti-Harassment Policies**: **Effective October 9, 2018**, employers are required to adopt a model policy to be developed by the New York Division of Human Rights (the “Division”) in conjunction with the State Department of Labor (“NYSDOL”), or revise or adopt its own comparable policy, and provide the policy in writing to each employee. Such policy shall include the following:
 - i. Examples of prohibited conduct that would constitute unlawful sexual harassment,
 - ii. Information regarding Federal and State statutory laws regarding sexual harassment and the remedies provided for under each law, as well as a statement that there may be applicable local laws in place,
 - iii. A standard complaint form,
 - iv. Procedure for the timely and confidential investigation of complaints and a process to ensure due process for all employees,
 - v. Information regarding employees rights of redress and all available forums (*i.e.*, court and governmental agencies) for adjudicating sexual harassment complaints,
 - vi. A clear statement that sexual harassment is a form of employee misconduct and that discipline will be enforced against the harasser and any managerial or supervisory employee who has knowledge of such behavior, and
 - vii. 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.
5. **Mandatory Interactive Harassment Training**: **Effective October 9, 2018**, employers are required to adopt model anti-harassment training to be developed by the Division and the NYSDOL and conduct annual interactive training on harassment in the workplace. Such trainings shall consist of the following:
 - i. An explanation of sexual harassment consistent with guidance issued by the Division and the State Department of Labor,

- ii. Examples of conduct that would constitute unlawful sexual harassment,
- iii. Information regarding Federal and State statutory laws regarding sexual harassment and the remedies provided for under each law, and
- iv. Information concerning employees' rights of redress and all available forums of adjudicating complaints.

New York City's Stop Sexual Harassment Act

Key highlights of the Stop Sexual Harassment Act, which, except as noted below, apply to government and all private employers are as follows:

1. Requirements of the Commission (Bill 614-A): Requires the New York City Commission on Human Rights (the "Commission") to make certain information about sexual and gender-based harassment available online for the public. This information will include examples of sexual harassment, a description of the Commission's complaint process, and other available agency resources. This bill takes effect ninety (90) days after it becomes law.
2. Employer Notice Requirements (Bill 630-A): Requires all employers in New York City to post an anti-sexual harassment rights and responsibilities poster. Employers also must provide an information sheet on sexual harassment to each employee at the time of hire. The poster and information sheet will be created and made available by the Commission. This bill takes effect 120 days after it becomes law.
3. Mandatory Interactive Harassment Training (Bill 632-A): Beginning on April 1, 2019, employers with at least 15 employees are required to conduct annual sexual harassment "interactive training" for employees who work 80 hours or more per year in New York City, including supervisory and managerial employees:
 - i. "Interactive training" does not require live or in-person training and instead is defined as a "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction" by way of audio-visuals, computer or online training programs.
 - ii. The training must be conducted after 90 days of initial hire for new employees who work more than 80 hours in a calendar year.
 - iii. The training must include the following components:

- An explanation of sexual harassment as a form of discrimination under the local, state and federal law;
 - A description of what sexual harassment is, using examples;
 - Any internal complaint processes available to employees through their employer to address sexual harassment claims;
 - The complaint process available through the Commission, the Division and the United States Equal Employment Opportunity Commission, including contact information;
 - The prohibition of retaliation and examples thereof;
 - Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
 - The 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.
- iv. Proof of training signed by the employee (electronic signature is acceptable) must be maintained for three (3) years, and
- v. An employee who has received sexual harassment training at one employer within the required training cycle need not receive additional sexual harassment training at another employer until the next cycle.
- vi. The Commission is required to develop an online interactive training module for use by employers.
4. Expansion of the Definition of Employer (Bill 657-A): Effective immediately if signed into law, this bill expands the New York City Human Rights Law (“NYCHRL”) coverage of sexual and gender-based harassment cases to include employers with fewer than four employees, thus aligning the NYCHRL with the New York State Human Rights Law’s coverage of sexual harassment claims.
5. Extended Time to File A Complaint (Bill 663-A): Effective immediately if signed into law, this bill lengthens the statute of limitations for filing harassment claims arising under the NYCHRL with the Commission from one year to three years after the alleged conduct occurs.

Provided below is a side-by-side comparison of the new laws in order to assist employers in coming into compliance:

New York State: Mandatory Written Policy	New York City: Mandatory Written Policy
Effective October 9, 2018	Effective 120 days after Mayor de Blasio signs into law
Applies to all private New York employers	Applies to all private New York City employers
Examples of prohibited conduct that would constitute unlawful sexual harassment	Must post an anti-sexual harassment rights and responsibilities poster to be developed by the Commission
Information regarding Federal and State statutory laws regarding sexual harassment and the remedies provided for under each law, as well as a statement that there may be applicable local laws in place	Must provide an information sheet on sexual harassment to new employees at the time of hire to be developed by the Commission
A standard complaint form	
Procedure for the timely and confidential investigation of complaints and a process to ensure due process for all employees	
Information regarding employees' rights of redress and all available forums (<i>i.e.</i> , court and governmental agencies) for adjudicating sexual harassment complaints	
A clear statement that sexual harassment is a form of employee misconduct and that discipline will be enforced against the harasser and any managerial or supervisory employee who has knowledge of such behavior	
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	

New York State Law: Mandatory Training	New York City Law: Mandatory Training
Effective October 9, 2018	Effective April 1, 2019
Annual basis	Annual basis
Applies to all New York employers	Employers with 15 or more employees
Interactive (not defined in the legislation)	Interactive, defined as a “participatory teaching whereby the trainee is engaged in a trainer-trainee interaction” by way of audio-visuals, computer or online training programs. The training does not have to be live or in-person
No specific time frame within the year to conduct	Administer within 90 days of employment
Include examples of conduct that would constitute unlawful sexual harassment	Include a description of what sexual harassment is, using examples
Include an explanation of harassment consistent with forthcoming guidance issued by the NYSDOL and Division of Human Rights (“DHR”)	Include an explanation of sexual harassment as a form of discrimination under the local, state and federal law
Include information concerning the federal and state statutory provisions regarding sexual harassment and the remedies available to victims of sexual harassment	Include the complaint process available through the Commission, the Division and the United States Equal Employment Opportunity Commission, including contact information
Include information concerning employees’ rights of redress and all available forums (<i>i.e.</i> , court, governmental agencies) for adjudicating complaints	Include any internal complaint processes available to employees through their employer to address sexual harassment claims
Must address supervisor conduct and any additional obligations imposed on supervisors	Must address the 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
	Include the prohibition of retaliation and provide examples
	Include information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention
Model training program to be devised by the NYSDOL and DHR	Model training program to be devised by the Commission of Human Rights

The penalties under the City and State discrimination laws are severe. Unintentional violations of the New York State Human Rights Law could result in civil fines and penalties of up to \$50,000 and up to \$100,000 for willful violations. Violations of the NYCHRL could result in civil fines and penalties of up to \$125, 000 and up to \$225,000 for willful violations.

While both sets of law contemplate additional guidance and training and policy modules from their respective Human Rights agencies, employers should act now in revising policies and preparing for employee and manager trainings to comply with the laws. Employers should also review any form arbitration agreements and settlement agreements and update those agreements to conform to the prohibition against non-disclosure clauses. We are available to assist you in revising your handbook or policies, conducting training, or answering any questions that you may have. Please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael Lydakis, Jennifer Schmalz or Jaclyn Ruocco.

*This memo is provided for informational purposes only.
It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.*