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CLIENT ALERT

New York's Budget Includes Employee Protections Against Sexual Harassment

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Last month, the New York State Legislature approved a $186 billion budget deal for the 2019 fiscal year, which includes a number of unique protections against sexual harassment in the workplace. The anti-harassment measures, which apply to public and private employers with at least "four persons in [their] employ," include: a prohibition on employers' use of mandatory arbitration clauses for sexual harassment claims; a ban on confidentiality clauses in any settlement involving a claim of sexual harassment; and a requirement that the New York State Department of Labor and the New York State Division of Human Rights develop both a model sexual harassment prevention policy and a model sexual harassment prevention training program. The budget also provides for an expansion of New York law to ban discrimination of non-employees in the workplace, which took effect immediately upon Governor Cuomo's signing of the budget last Thursday, April 12, 2018. The restrictions on mandatory arbitration and nondisclosure clauses will take effect on Wednesday, July 11, 2018 (90 days after the budget's signing), and the model prevention policy and training program will take effect on Tuesday, October 9, 2018 (180 days after the budget's signing). In addition, the budget includes certain provisions designed to ensure the compliance of state contractors and public employers, which take effect on January 1, 2019. The measures are outlined below.

Mandatory Arbitration Clauses

The approved budget features a ban on mandatory arbitration clauses, which it defines to mean "a term or provision contained in a written contract which requires the parties to such contract to submit any matter thereafter arising under such contract to arbitration prior to the commencement of any legal action to enforce the provisions of such contract and which also provides language to the effect that the facts found or determination made by the arbitrator . . . in its application to a party alleging an unlawful discriminatory practice based on sexual harassment shall be final and not subject to independent court review." This prohibition includes a carve-out whereby any "non-prohibited clause or other mandatory arbitration provision within such contract" will be permitted as long as "the parties agree upon" such clause or provision.

Ultimately, this measure may be largely symbolic, as it is likely preempted by the Federal Arbitration Act (FAA) for any arbitration agreement governed by the FAA. The FAA "preempts any state rule that discriminates on its face against arbitration"—for example, a law prohibiting outright the arbitration of a particular type of claim—or a state rule "that

covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1423 (2017). New York employers should ensure that their arbitration agreements are governed expressly by the FAA if they plan to avoid the reach of this new state law.

As with the other anti-sexual harassment measures in the state's budget, the prohibition on mandatory arbitration clauses will not be applied retroactively.

Nondisclosure Agreements

The budget also amends New York's General Obligations Law and Civil Practice Law and Rules to prohibit employers or their officers or employees from "includ[ing] or agree[ing] to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves sexual harassment, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference." Further, even if the condition of confidentiality is the complainant's preference, any such term or condition must be provided to all parties, and the complainant must have twenty-one (21) days to consider such term or condition. Then, should the term or condition remain the complainant's preference after the 21-day period, this understanding must be memorialized in a written agreement signed by all parties. This agreement will thereafter be revocable for a period of at least seven days, and will not be enforceable until after this seven-day period expires.

Prevention Practices

The budget also amends the New York Labor Law to require the Department of Labor to consult with the Division of Human Rights in order to create and publish both a model sexual harassment prevention policy and a model sexual harassment prevention training program. Among other things, the model prevention policy is required to include a standard complaint form and a procedure for the timely and confidential investigation of complaints, and clearly states that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful. Every employer will in turn be required to adopt the model prevention policy as a floor for its sexual harassment policies and procedures, and to provide such model policy to all employees in writing.

The model sexual harassment prevention training program is required to be interactive, and also must, among other things, inform employees of their rights and all available forums for adjudicating complaints administratively and judicially, and include a standard complaint form and a procedure for a timely and confidential investigation.

Expansion of Liability

The budget amends the New York Executive Law to make it an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in the workplace. Specifically, when the employer, its agents, or supervisors knew or should have known that the non-employee was subjected to workplace harassment, the employer may be liable as long as the non-employee is (i) a contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace, or (ii) an employee of such contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace.

State Contractors and Public Employers

Finally, the budget requires that any bid for a state contract include language affirming that the bidding entity has implemented a written policy addressing workplace sexual harassment and that it provides annual sexual harassment prevention training to its employees.

In addition, any employee of the state found responsible for committing sexual harassment must “personally reimburse” any state agency or public entity-funded damages award payments within 90 days of the payout of the award by the state.

New York employers should ensure compliance with all state legislation, paying especially close attention to areas where state and local requirements differ from federal requirements.

The full text of the rule may be reviewed here.

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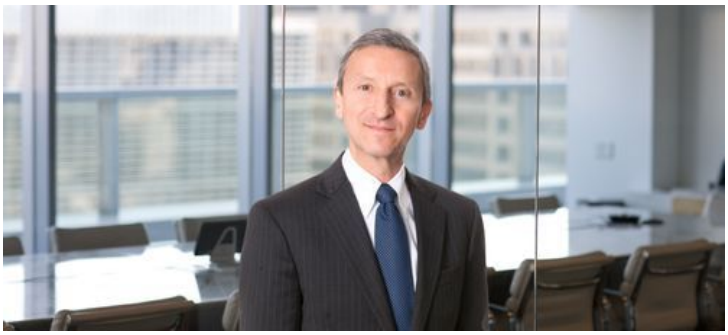

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