Five Things Employers Must Know About NY's New Anti-Sexual Harassment Laws

HOGUET NEWMAN REGAL & KENNEY, LLP

By Randi May and Kathleen Lowden | August 16, 2018

Employers should not replace their current policies with the model policy or simply adopt it without consulting a labor and employment lawyer.

In the wake of the #MeToo movement, both New York State and New York City have passed a package of laws aimed at combatting sexual harassment. Each of these laws applies to employers of all sizes – even those with only one employee. Below are the top five takeaways for New York employers.

Notifying Employees of the Sexual Harassment Policy

By Sept. 6, New York City employers must display a poster in English and Spanish, (designed by the NYC Commission on Human Rights), about anti-sexual harassment rights and responsibilities. Also by Sept. 6, New York City employers must distribute a fact sheet about sexual harassment (created by the commission) to their existing employees and to all new employees upon hire, or they may include the fact sheet in their employee handbooks instead. By Oct. 9, every employer in New York state must have a written sexual harassment prevention policy in place and distribute it to its employees.

Employers can use a model policy that will be created by the New York State Department of Labor and the New York State Division of Human Rights, or they can create their own policy provided that it equals or exceeds the minimum standards set forth in the model policy. The policy shall:

- prohibit sexual harassment and provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available and a statement that there may be applicable local laws;
- include a standard complaint form;
- include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

Please note that many employers, with good reason, include much more in their policies, such as a warning that false and malicious accusations may result in disciplinary action, a statement that investigations will be handled as confidentially as possible, and that participating in an investigation and reporting sexual harassment are also protected from retaliation. Additionally, employers often include policies about fraternization and employee dating with sexual harassment policies. Likewise, employers should have anti-discrimination policies in addition to anti-sexual harassment policies. Finally, New York's policy will not necessarily satisfy standards under federal law. Therefore, employers should not replace their current policies with the model policy or simply adopt it without consulting a labor and employment lawyer.

Mandatory Sexual Harassment Training

Beginning Oct. 9, every New York state employer must provide sexual harassment prevention training to all employees on an annual basis. Employers can either use the model sexual harassment prevention training program created by the New York State Department of Labor and the New York State Division of Human Rights or establish their own training program that equals or exceeds the minimum standards provided by the model. It seems likely that this training can be given online provided it is interactive.

Beginning April 1, 2019, all New York City employers with 15 or more employees must provide interactive (but not necessarily live) sexual harassment prevention training to all full- and part-time employees and interns annually, and to new employees within 90 days of hire.

The NYC Commission on Human Rights will create an interactive training module that will be available to employers free of charge. While these government-created training programs will meet minimum legal requirements, employers should consider providing more detailed, in-person sexual harassment and anti-discrimination training programs.

Nondisclosure Agreements Regulated

Since July 11, 2018, in New York state, agreements settling claims of sexual harassment cannot include non-disclosure provisions unless the condition of confidentiality is the employee's "preference."

Employees must be given 21 days to consider any settlement agreement and to decide whether they prefer that it contain a non-disclosure provision, and then given 7 days to revoke the agreement.

Arbitration Provisions

Since July 11, 2018, in New York state, most new employment contracts cannot require employees to submit to mandatory arbitration to resolve any allegation or claim of sexual harassment.

Independent Contractors and Others Protected

The state legislation adds a new section to the New York Human Rights Law that prohibits sexual harassment of non-employees in the workplace. The term "non-employee" includes contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace—or an employee of any of these. An employer will be liable when the employer (including its agents and supervisors) knew or should have known that the non-employee was subjected to sexual harassment in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. This section took effect in April of 2018.

Employers should contact a labor and employment law attorney to ensure compliance with these laws.

Randi May is a partner and Kathleen Lowden is an associate at Hoguet Newman Regal & Kenney. They focus on employment matters.