

## A PLANNING GUIDE NYS/NYC SEXUAL HARASSMENT LAWS



**LAWS ON WORKPLACE SEXUAL HARASSMENT** are changing dramatically for New York State employers, with still further changes in store for employers operating in New York City. These changes will take effect incrementally over the

next 10 months. The timeline below is designed to help employers track the calendar of new requirements, and is supplemented by commentary that includes suggested steps employers can take now to prepare.

● **PROTECTION FOR NONEMPLOYEES** Nonemployees in NYS, including independent contractors, consultants and vendors, are protected against harassment; employer can be liable for failure to take appropriate and immediate corrective action, taking into account degree of employer's control over the alleged harasser.

● **NYS SEXUAL HARASSMENT NDAs BARRED** NYS employers cannot include nondisclosure provision in agreements settling sexual harassment claims, unless the complainant "prefers" to do so. In such cases, the complainant must be given 21 days to consider the agreement, and seven days to revoke signature after signing.

■ **NYC POSTER AND INFO SHEET REQUIREMENT** NYC employers must display new anti-harassment poster in English and Spanish and distribute new anti-harassment information sheet (both to be developed by NYCCHR) to employees at time of hire.

● **NYS ANTI-HARASSMENT POLICY REQUIREMENT** NYS employers must adopt a sexual harassment prevention policy that equals or exceeds the standards included in a NYSDOL developed model policy and provide it to all employees in writing. The policy will need to (i) prohibit sexual harassment and include examples of prohibited conduct, (ii) identify state and federal harassment laws and remedies, (iii) include a complaint form, (iv) set forth an investigation procedure, (v) provide a list of judicial and administrative forums for adjudicating harassment complaints, (vi) state that harassment constitutes employee misconduct, and that employees who commit harassment and supervisors who knowingly allow it to continue will be sanctioned, and (vii) prohibit retaliation for harassment complaints.

NOW

JULY 11,  
2018

SEPT. 6,  
2018

OCT. 9,  
2018

APRIL 1,  
2019

NEW YORK STATE EMPLOYERS

NEW YORK CITY EMPLOYERS

● **NYS SEXUAL HARASSMENT ARBITRATION BAN** NYS employers cannot require employees to sign employment, separation or other agreements imposing mandatory arbitration of sexual harassment claims (except as part of a collective bargaining agreement), and existing mandatory arbitration clauses can no longer be enforced with respect to sexual harassment claims.

● **NYS ANTI-HARASSMENT TRAINING REQUIREMENT** NYS employers must provide annual anti-harassment training to all employees. NYSDOL to issue model training program that employers must equal or exceed. Training must be "interactive" and include (i) an explanation of sexual harassment, (ii) examples of sexual harassment, (iii) information concerning state and federal harassment laws and remedies, (iv) information concerning employees' rights of redress and available forums for adjudicating harassment complaints, and (v) information concerning supervisors' conduct and responsibilities.

■ **NYC ANTI-HARASSMENT TRAINING REQUIREMENT** NYC employers with 15 or more employees, including interns, must provide annual "interactive" anti-harassment training for all employees. Training must occur within 90 days of initial hire. NYCCHR to issue online training module; training must include discussion of "bystander intervention." Employers must keep training records, including signed employee acknowledgments, for three years.



## COMMENTARY

- There is a strong possibility that the courts will determine that the prohibition on mandatory arbitration of sexual harassment claims is preempted by the Federal Arbitration Act and, therefore, unenforceable. A judicial determination of this point, however, may take months or even longer.
- Requiring that a complainant “prefer” a nondisclosure provision for it to be lawful and enforceable raises a number of practical questions. For example, is the condition only satisfied if the complainant, of her own accord, requests such a provision to gain assurances of confidentiality from the employer? Or might the complainant’s choice to accept a higher settlement payment, in exchange for a nondisclosure provision, amount to the complainant’s “preference” for a nondisclosure provision? Or could it even be the case that a complainant’s choice to accept settlement terms that include a nondisclosure provision is sufficient to demonstrate a “preference,” provided that the complainant doesn’t request removal of the nondisclosure provision?
- Employers may wish to hold off on adopting a new policy or training program until they have had the chance to review the models to be issued by the New York Department of Labor (and the training module to be developed by the New York City Commission on Human Rights). But it may be prudent to start reviewing existing policies and training programs sooner, to ensure that they meet at least the minimum statutory requirements. Employers may also want to issue revised policies or commence training earlier than the October 9 deadline, to reinforce the organization’s commitment to combating workplace harassment.

## WHAT EMPLOYERS CAN DO NOW

- Start reviewing sexual harassment policies and planning training
- Consider implementing new policies and training programs *early*
- Monitor model training programs and anti-harassment policies to be issued by state and city agencies

- Monitor anti-harassment poster and information sheet to be issued by city agency
- Review employment, separation and other agreements for mandatory arbitration provisions and nondisclosure provisions covering sexual harassment claims, and determine go-forward approach
- Review insurance policies to ensure adequate coverage in light of changes in anti-harassment laws (e.g., determining whether the current policy covers the employer’s potential liability for sexual harassment of independent contractors, consultants and vendors)

## CONTACTS



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