

Trials & TRIBULATIONS

New York State passes sexual harassment legislation

As part of the 2018-2019 state budget (S7507-C) that was signed into law by Gov. Andrew Cuomo on April 12, 2018, New York State enacted a series of measures that will establish stricter guidelines and penalties for employers and government employees when it comes to workplace sexual harassment and discrimination. The relevant provisions are all contained in Part KK of the budget.

Taking effect immediately is an expansion of protections for non-employees. The newly enacted state budget adds section 296-D to the Executive Law and makes it unlawful for an employer to permit sexual harassment of non-employees in its workplace. This protection extends to contractors, subcontractors, vendors, consultants or any other person providing services pursuant to a contract, or the employees of any contractors, subcontractors, vendors or consultants. The law requires employers who know or should have known of the sexual harassment of the non-employee in its workplace to take "immediate and appropriate corrective action."

The budget also modified the Public Officers Law, adding sections 17-A and 18-A. These provisions, which go into effect immediately, potentially subject public employees to financial penalties for sexual harassment. Section 17-A covers all "employees" holding a position by election, appointment or employment, whether or not compensated, as well as former employees or judicially appointed personal representatives. Section 18-A extends to any employee who is a "commissioner, member of a public board or commission, trustee, director, officer, employee or any other person holding a position by election, appointment or employment in the service of a public entity, whether or not compensated."

Should any individual qualify as an employee under these new provisions and be found personally liable for sexual harassment, the



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Daily Record
Columnist

state can seek indemnification for any compensation it is required to pay to a plaintiff pursuant to a final adjudication. Both sections permit the garnishment of the employee's wages in the event that they fail to reimburse the state within 90 days.

Taking effect July 11, 2018, are provisions governing non-disclosure agreements (NDAs) and mandatory arbitration clauses as they relate to sexual harassment claims. First, Subpart B modifies Civil Practice Law and Rules (CPLR) section 7515 to prohibit contractual clauses requiring mandatory arbitration of sexual harassment claims. The modification seeks to address widespread criticism regarding the secrecy with which sexual harassment claims are resolved, and it nullifies arbitration provisions in future contracts, with the goal of permitting employees to pursue private actions to resolve sexual harassment claims transparently. However, it remains to be seen whether this provision, which is expressly limited by federal law, will have any impact due to the Federal Arbitration Act, which may very well pre-empt the prohibition.

The second provision taking effect this July is Subpart D, which modifies General Obligations Law section 5-336 and CPLR section 5003-b. In an effort to improve transparency, the modifications prohibit employers from including a confidentiality provision or NDA as part of a settlement agreement or resolution of sexual harassment claims unless certain protocols are followed. First, the confidentiality clause must be provided to the complainant to review for a period of 21 days. If the com-

plainant does not reject the NDA or it is the complainant's preference to keep the settlement confidential, such preference will be memorialized. The complainant will then have at least seven days to revoke their agreement to the confidentiality provision or NDA.

While many employers already require and/or provide sexual harassment and discrimination training to their employees, the new budget makes this practice mandatory. Specifically, the state budget adds section 201-g to the Labor Law and requires the Department of Labor to consult with the NYS Division of Human Rights to "create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy" to be adopted by all employers. The policy must prohibit sexual harassment, inform employees of federal and state remedies for sexual harassment, create a complaint form, establish guidelines for investigations, inform employees of all administrative and judicial forums available to them, establish that employees who engage in sexual harassment will be deemed to have engaged in misconduct, and prohibit retaliation for making complaints related to sexual harassment or for assisting complainants with their claims.

The Department of Labor, in consultation with the Division of Human Rights, must also create an interactive model sexual harassment training program. The program must explain what sexual harassment is, provide examples of unlawful sexual harassment, provide information regarding federal and state law and remedies available under those laws, provide information to employees regarding their right to redress and the available forums for resolving complaints and address sexual harassment by supervisors. While employers can use the new training program, they are also free to create their own training program so long as it "equals

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or exceeds” the state’s model training program.

Lastly, the state’s budget adds section 139-1 to the Finance Law to require every company bidding on state procurement contracts, where competitive bidding is required, to submit an affirmative statement along with its bid that the employer has complied with the new sex-

ual harassment training and policy requirements required by Labor Law section 201-g. Non-mandatory competitive bidding contracts may also require such an affirmative statement be submitted along with the bid as well.

Given the current sociopolitical climate, it is likely that the newly enacted provisions contained in the state budget are just the tip of the

iceberg. Employers should be cognizant of the new requirements regarding workplace sexual harassment and take steps to ensure compliance with the newly enacted provisions.

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