STROOCK
SPECIAL BULLETIN

Governor Cuomo Signs 2019 Budget Bill With Significant Provisions Addressing Workplace Sexual Harassment Claims

April 17, 2018

On April 12, 2018, Governor Andrew Cuomo signed the New York State 2019 Budget Bill (the "Budget"), which contains, among other things, provisions:

- Requiring employers to adopt a sexual harassment prevention policy that equals or exceeds the standards of a model policy to be created by the Department of Labor (DOL) and Division of Human Rights (DHR);
- Requiring employers to establish a sexual harassment prevention training program that equals or exceeds a model program to be created by the DOL and DHR and provided to employees on an annual basis;
- Imposing liability on employers for permitting sexual harassment of non-employees, such as contractors, subcontractors, vendors, and others providing services pursuant to contract in the workplace;
- Prohibiting, except where inconsistent with federal law, contract provisions that require mandatory arbitration of sexual harassment claims as a condition of a party enforcing or obtaining remedies under a contract; and
- Limiting the use of contractual provisions that preclude a party from disclosing the underlying facts and circumstances of a sexual harassment claim unless the condition of confidentiality is the complainant's preference.

Mandatory Sexual Harassment Prevention Policies and Training

The Budget adds a new Section 201-g to the New York Labor Law ("Section 201-g"), which becomes effective 180 days following enactment, on October 9, 2018. Section 201-g requires the DOL and DHR to consult and create and publish a model sexual harassment policy (the "Model Policy") that shall:

> (i) prohibit sexual harassment consistent with guidance issued by the [DOL] in consultation with the [DHR] and provide examples of prohibited conduct that would constitute unlawful sexual harassment;
>
> (ii) include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual

harassment and a statement that there may be applicable local laws;

(iii) include a standard complaint form;

(iv) include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;

(v) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

(vi) 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

(vii) clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The DOL and the DHR must also consult to produce a model sexual harassment prevention training program to prevent sexual harassment in the workplace (the "Model Training Program"). The Model Training Program must be interactive and include:

(i) an explanation of sexual harassment consistent with guidance issued by the [DOL] in consultation with the [DHR];

(ii) examples of conduct that would constitute unlawful sexual harassment;

(iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; and

(iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.

The Model Training Program shall also address conduct by supervisors and any additional responsibilities for such supervisors.

The DOL and the DHR must make the Model Policy publicly available and post it on each of their websites. All employers must adopt the Model Policy and utilize the Model Training Program or ones that equal or exceed their minimum standards. Compliant sexual harassment prevention training must be provided to all employees on an annual basis.

The Labor Commissioner may promulgate regulations as deemed necessary to carry out Section 201-g.

In addition to updating their policies and training programs, employers should take note of the implications of certain language in Section 201-g. For example, the requirement that the Model Policy must provide for a "confidential investigation" seems to conflict with the long-held position of the U.S. Equal Employment Opportunity Commission that employers can only provide confidentiality "to the extent possible, consistent with conducting a thorough investigation." Nor is it clear what is meant by requiring that the policy provides for an investigation that ensures "due process for all parties." Perhaps the DOL and DHR will provide an investigative checklist for employers or otherwise issue regulations with further guidance.

Liability for Sexual Harassment of Non-Employees

The Budget amends the Executive Law to add a new Section 296-d ("Section 296-d"), which takes effect immediately. Pursuant to Section 296-d:

. . . An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant

> to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to sexual harassment, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace, and the employer failed to take immediate and appropriate corrective action.

This amendment extends the negligence standard for determining liability of an employer for preventing or stopping harassment of an employee by a coworker to harassment of a non-employee.

Mandatory Arbitration of Sexual Harassment Claims

Subpart B of the Budget adds a new Section 7515 to the Civil Practice Law and Rules ("CPLR 7515"), which prohibits, except where inconsistent with federal law, pre-dispute mandatory arbitration provisions requiring the arbitration of sexual harassment claims in written contracts entered into after July 11, 2018.

A "prohibited clause" under Section 7515 "requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment." Mandatory arbitration means that the parties are required 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 . . . that the facts found or determination made by the arbitrator or panel of arbitrators 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."

Any mandatory arbitration clause that violates Section 7515 is null and void, but will not impair the enforceability of the rest of the contract. If a collective bargaining agreement provides for mandatory arbitration of sexual harassment claims, however, the collective bargaining agreement shall control.

Employers should anticipate a Federal Arbitration Act preemption challenge to the prohibition of pre-dispute compulsory arbitration of sexual harassment claims.

Non-Disclosure Agreements

The Budget also amends the General Obligations Law and the CPLR to limit the use of nondisclosure agreements in connection with the resolution of sexual harassment claims. No settlement agreement or any resolution of any claim, the factual foundation for which involves sexual harassment, may include 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."

Any such non-disclosure provision must be provided to all parties and the complainant, or plaintiff, as the case may be, must have 21 days in which to consider it. If, after 21 days, the complainant prefers to include such term or condition, such preference shall be memorialized in an agreement signed by all parties. The complainant may revoke the agreement for seven days following execution, and the agreement will not become effective or enforceable until such revocation period has expired.

The 21-day review and 7-day revocation period is similar to one of the requirements for a knowing and voluntary release of claims under the Older Workers Benefit Protection Act ("OWBPA"). It is not clear, however, if all or any portion of the 21-day review period may be waived by the complainant, as is the case with the OWBPA.

General Obligations Law Section 5-336 and Civil Practice Law and Rules Section 5003-b take effect on July 11, 2018.

The confidentiality provision strikes a reasonable compromise given that frequently, **both** the complainant and the employer want to settle sexual harassment claims on a confidential basis. The review and revocation period would seem to help ensure that the confidentiality clause was, in fact, entered into on a voluntarily basis.

Comments

These are sweeping changes, which will impact all employers throughout New York State. There are, however, open questions, many of which may be addressed by the DOL and DHR.

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