New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 260—NO. 97
MONDAY, NOVEMBER 19, 2018

Outside Counsel

Expert Analysis

How Employers Are Responding to NY's New Anti-Sexual Harassment Laws

By **Samuel Estreicher**

And **Holly H. Weiss**

In April 2018, New York state enacted an anti-sexual harassment law that, among other things (1) requires all employers in New York, regardless of size, to implement anti-sexual harassment policies and to conduct annual anti-harassment training that complies with minimum standards set forth in the statute (§201-g of the Labor Law); (2) bans pre-dispute agreements requiring arbitration of sexual harassment claims "except where inconsistent with federal law" (C.P.L.R. Section 7515); and (3) requires confidentiality provisions in settlement agreements resolving sexual harassment claims to be at the "complainant's preference" and sets forth procedural requirements for compliance with the statute's requirement (C.P.L.R. §5003-b). Six months later, the New York State Department of Labor issued guidance, including model documents and Frequently Asked Questions (FAQs), to assist employers in complying with the new statutory requirements. See https://www.ny.gov/programs/combating-sexual-harassment-workplace. This column addresses the likely impact of these requirements and prohibitions on employers in New York.

Anti-Sexual Harassment Policies

Many employers have long implemented comprehensive policies prohibiting employment discrimination, including discrimination on the basis of sex, race, religion, national origin, age and other protected classifications, harassment (based on sex and other protected classifications), and retaliation. These policies typically define prohibited conduct, include examples of prohibited conduct, set forth a complaint procedure, and prohibit retaliation against individuals who complain of discrimination or who assist in any investigation of discrimination. The model policy addresses only sexual harassment. Employers should not replace their existing policies that contain broader prohibitions. In theory, employers could adopt the model policy for sexual harassment as an additive to the employer's broader policy dealing with all forms of discrimination. Many employers, understandably, have not implemented the model policy, but, rather, have revised their existing policies to ensure that they comply with the minimum standards set forth in the state statute, using the model policy as a compliance tool. For example, the statute requires policies to "include a complaint form"

Employers should not replace their existing policies that contain broader prohibitions. In theory, employers could adopt the model policy for sexual harassment as an additive to the employer's broader policy dealing with all forms of discrimination.

SAMUEL ESTREICHER *is the Dwight D. Opperman Professor and Director of the Center for Labor and Employment Law at New York University School of Law.* HOLLY H. WEISS *is a partner at Schulte Roth & Zabel.*

and to "inform employees of their rights of redress and all available forums," but many policies did not include either. Now employers will add those features. In addition, some employers have adopted language from the model policy to ensure that the language used in their policies is consistent with the language used in the model policy. For example, the model policy uses the term "target" rather than "victim" to refer to individuals subjected to harassment, and, rather than "complaints" of harassment, the model policy uses "reports."

Anti-Sexual Harassment Training

Many New York employers regularly conduct anti-discrimination training covering categories of conduct that are broader than sexual harassment. Those employers will not likely replace the content of their training with training that covers only sexual harassment, but instead will act to ensure that their anti-discrimination training complies with the statute's minimum standards. Those standards require, among other things, that training be "interactive," occur annually, and "include information concerning employees' rights of redress and all available forums for adjudicating complaints." Given that employers are required to provide sexual harassment prevention training annually, some employers may opt instead to conduct training only with respect sexual harassment one year, followed by more comprehensive training that covers all forms discrimination (including sexual harassment) the following year.

Arbitration Prohibition

The law prohibits "any clause or provision … [requiring] that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment," and that any such "mandatory arbitration clause" with respect to sexual harassment is null and void. The statute includes a carve-out—"except where inconsistent with federal law." The U.S. Supreme Court has repeatedly held that the Federal Arbitration Act (FAA) expresses a "liberal policy favoring arbitration" (*AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011); see also *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1621 (2018)), and that "[w]hen a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 563 U.S. at 341. Except in cases involving transportation workers (who are exempted from the FAA)—and unless Congress amends the FAA—it is likely that the FAA will be held to preempt the arbitration bar of the New York statute. New York employers, therefore, should consider whether to continue to use existing arbitration provisions going forward, rather than carve out sexual harassment claims.

Confidentiality Provisions

The law provides that no settlement agreement involving a sexual harassment claim may include a confidentiality provision unless confidentiality is the "complainant's preference." Procedurally, the "complainant's preference" must be included in a written agreement, and the complainant must be given at least 21 days to consider the condition (which time period cannot be waived), and has seven days after executing the agreement to revoke the agreement. If a matter does not involve a sexual harassment claim, prudent employers will include representations to that effect in the settlement agreement. The Frequently Asked Questions put out by the State Department of Labor spell out a three-step process, the first of which is to provide the confidentiality condition to all parties, followed by written memorialization of the complaint's preference after 21 days. If a matter involves sexual harassment, employers that will not agree to settle the matter without a confidentiality provision should consider stating that condition in writing to the complainant when settlement discussions commence, to start the 21-day clock.

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London