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SPECIAL ALERT ON NEW YORK STATE

# Sexual Harassment Law

## New York State Employers Must Comply with New Law in July

When New York Governor Andrew Cuomo signed New York's Fiscal Year 2019 Budget into law on April 12<sup>th</sup>, the clock started ticking for employers in the state to take action to reform, or in some cases to add, policies addressing sexual harassment in the work place. These new laws institute significant changes regarding sexual harassment policies in the work place, aimed at both private and public employers and at companies which competitively bid to provide work or services to the state or to any public department or agency.

Beginning July 11<sup>th</sup>, 2018, the new laws will start to be phased in. They will prohibit the use of mandatory, binding arbitration for alleged unlawful discriminatory practice based on sexual harassment, and prohibit the use of nondisclosure agreements in sexual harassment settlement agreements, unless it is the complainant's preference. These new state laws cannot be viewed in isolation from changes to the Federal tax code enacted December 22, 2017, which restrict an employer's ability to deduct settlement payments and legal costs associated with payments to claimant's asserting sexual harassment claims.

This series of new laws raise questions and potential issues regarding protections granted to complainants and victims of sexual harassment in the workplace. Employers are strongly urged to use the time

before the new laws are phased in to meet with their corporate or labor attorney to discuss changes in employment related agreements, including general releases, as well as to discuss general strategy in the event a sexual harassment claim is made.

### Arbitration

The new CPLR Section 7515 prohibits mandatory, binding arbitration agreements which are final and not subject to review by an independent court. However, the provision is silent on arbitration agreements that allow awards to be later reviewed by an independent court. The section also contains an exception which may allow a mandatory arbitration provision in a contract if the parties agree upon it.

In what may lead to future litigation, the law indicates that the provision can be proscribed if inconsistent with federal law. The Supreme Court of the United States, in deciding *AT&T Mobility LLC v. Concepcion*, held that "when state law prohibits outright the arbitration of a particular type of claim, [analysis] is straightforward: the conflicting rule is displaced by the [Federal Arbitration Act ("FAA")]."  
563 U.S. 333, 341 (2011). The current language of the new CPLR 7515 may potentially be invalidated and superseded by the FAA if challenged in court—unless Congress modifies the FAA itself to track the sexual harassment laws passed or being contemplated by a number of states

## Nondisclosure Agreements

The new laws, set out in General Obligations Law Section 5-336 (new) and CPLR Section 5003-b (new), also empower sexual harassment complainants by making *their* preference the determining factor on whether a settlement agreement or other resolution of a claim which involves sexual harassment will contain terms or conditions preventing disclosure of the underlying facts and circumstances of the claim. The complainant has twenty-one days to consider the terms or conditions before agreeing, and any such preference must be memorialized in an agreement signed by all parties. The complainant then has an additional seven days *after* signing any written agreement with the terms/conditions to revoke that agreement. Any such nondisclosure agreement can only be considered effective once the revocation period has ended.

Although the sexual harassment complainant will ultimately decide their preference on the inclusion/exclusion of any nondisclosure provision, the new laws do not appear to contain a proscription against the employer from seeking inclusion of the condition. What is not yet clear is whether a revocation of an agreement to nondisclosure provisions will merely cancel out that specific provision or nullify the entire agreement.

## Federal Tax Code

One thing is clear concerning nondisclosure agreements: new changes to the Federal tax code expressly prohibit a company from deducting amounts paid in connection with settling sexual harassment and sexual abuse claims, including attorney's fees related to such matter, if the settlement payment agreement requires nondisclosure on the part of the employee. For New York employers, it is a yet unanswered question as to the ability to make such a deduction if the complainant signs an agreement under the new New York law, expressing a preference for nondisclosure.

The amendment to the Internal Revenue Code does not provide any definition of sexual harassment or sexual abuse and gives no guidance on what employers should consider "related to" sexual harassment, especially when sexual harassment may not be clearly recognizable. Fur-

ther, there is a current lack of guidance on what an employer can expect if an employee has multiple claims, only one of which is based on sexual harassment. Under the new tax code an employer will need to separate amounts paid/associated with a sexual harassment or sexual abuse claim from claims of a different nature, and possibly have separate settlement agreements based on the nature of the claims settled, to be able to distinguish the nature of the settlement payments made. Otherwise, the employer may face loss of the ability to deduct any of the settlement payment.

Finally, as the amendments to the code prohibit deducting attorney's fees related to any settlement or payment related to sexual harassment or sexual abuse, employers may find themselves unable to deduct legal fees associated with arbitration proceedings which lead to a settlement. Even if the new New York state laws are proscribed by the FAA, or arbitration agreements are made allowing review by an independent court, employers still may not be able to deduct these legal fees because of the impact of the new federal tax code provisions.

The enactment of the new anti-harassment laws introduced in New York's Fiscal Year 2019 Budget raises many questions. Employers must review employment agreements with employment and corporate/tax attorneys, giving specific attention to general release, nondisclosure and/or arbitration provisions, to ensure proper compliance with the new laws and to understand the possible financial repercussions of their actions on their own bottom line. Employers need to begin reviewing, and revising where needed, their policies on sexual harassment in the workplace.

That is not just good advice—it is now required under new Labor Law section 201-g titled "The prevention of sexual harassment". This will be the subject of our second installment on the new state sexual harassment laws after the State Department of Labor and Division of Human Rights issue regulations and develop a model sexual harassment prevention policy and training program. All employers will be required to comply with those regulations by having in place, no later than October 9, 2018, sexual harassment policies and training programs. Stay tuned!