New York State Moves One Step Closer to Changes to Sexual Harassment Laws

Insights
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On March 12, 2018, the New York State Senate passed a bill aimed at strengthening and reforming the state sexual harassment laws. The legislation comes on the heels of the #MeToo movement and mirrors much of what Governor Cuomo proposed in his January State of the State Address, including a ban on confidential settlements and mandatory arbitration clauses. If ultimately enacted into law, the legislation will significantly impact both public and private employers in New York.

The Senate's bill effortlessly passed its first hurdle, with a vote in the Republican-controlled Senate of 56-2. Next up, the bill will be delivered to the Democratic-controlled Assembly. Should the bill pass muster at the Assembly, it will move to Governor Cuomo, who will either sign it into law or veto it. Given Governor Cuomo's previously announced multi-pronged agenda aimed at combatting sexual harassment in the workplace, it is likely he will be in strong favor of the legislation.

What does the legislation entail?
The Senate's legislative package encompasses a multitude of measures aimed at reforming the state's sexual harassment laws, in both the public and private sector. Specifically, the Senate's bill includes the following:

- **Statutory Definition of Sexual Harassment:** Although the New York State Division of Human Rights has defined the term "sexual harassment" for administrative use, there is currently no statutory definition of sexual harassment under state law. The Senate's bill would codify the definition of "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature if such conduct is made either explicitly or implicitly a term or condition of employment, or submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the complaining individual is not the intended target of the sexual harassment." The codification of the definition of sexual harassment is aimed at protecting litigants from various, differing interpretations by judges.
- **Prohibition of Confidential Settlements:** The Senate's legislation would prohibit the use of confidential settlements for any action to recover damages for sexual harassment and would require court approval for any settlement that includes confidentiality terms. Specifically, courts

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could not accept any settlement that includes confidentiality terms or any provision that would prevent disclosure of factual information related to the sexual harassment action, unless included at the complainant's preference. The court would be required to approve any settlement agreement with such confidentiality terms, as per the complainant's preference. The court could only accept the settlement if the court finds that the complainant's "preference" is not a result of intimidation, coercion, retaliation or threats directed at the complainant. The court would also need to consider the "potential impact on the public" prior to approval. This prohibition appears to apply only to sexual harassment lawsuits, and not to claims that get resolved without court intervention. Employers should be aware that the recent federal tax reform law eliminated the ability of a business to take a tax deduction for any sexual harassment settlement that contains a confidentiality provision or nondisclosure agreement.

- **Prohibition of Mandatory Arbitration Agreements:** The bill would ban contractual provisions that mandate arbitration for any allegations or claims of sexual harassment.
- **Extension of Sexual Harassment Protections to Non-Employees**: Currently, individuals who are not "employees" but are otherwise present in a workplace, such as contractors, vendors or consultants, cannot file a claim for sexual harassment. The Senate's bill aims to fix this gap in protection and would extend the State's sexual harassment laws to such non-employees.
- **Development of Model Sexual Harassment Policies and Training**: The Senate's legislation would task the State Department of Labor with creation of a model sexual harassment policy, that would: (i) state the definition of sexual harassment; (ii) provide examples of conduct that constitute sexual harassment; (iii) include information about federal and state statutes concerning sexual harassment and remedies available to victims; (iv) inform employees of their rights of redress and the availability and forms of complaint resolution assistance available; and (v) clearly state that sexual harassment is 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. The Department of Labor would also be required to develop model training programs to prevent sexual harassment in the workplace. The training is intended to be interactive and no less than two hours in length.
- **Require State Contractors to Have Sexual Harassment Policies and Training:** If implemented, the legislation would require every state contractor to maintain anti-sexual harassment policies that are distributed widely to employees. Additionally, two hour anti-sexual harassment training would be mandated on an annual basis.
- **Protect Taxpayer Funds for Sexual Harassment Settlements:** In order to prevent taxpayer money from being used for to pay for sexual harassment settlements, the legislation would prohibit indemnification of any public employee for any judgment or settlement for a claim for sexual harassment, where the employee engaged in intentional wrongdoing. Should the State be required to make any payment to a complainant, such payment would be subject to the state receiving a written subrogation agreement from the claimant, whereby the state could go after the responsible party for its costs and damages. This measure will hold the harasser financially accountable for the settlement, rather than the taxpayers.

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- **Create a Uniform Sexual Harassment Policy for Public Employers:** The Senate's legislation also aims to create a uniform sexual harassment prevention policy for all public entities in the state. The uniform policy would include information regarding how and with whom to file a complaint, standardized investigation procedures and a standard complaint form.

What Should New York Employers Do Now?

The Senate's bill still faces hurdles before becoming law, but the overwhelming support for the bill on both sides of the aisle reaffirms Fisher's prediction that substantive changes to the State's sexual harassment policies are imminent. This is, of course, in addition to potential legislative efforts on the federal and local level.

Although employers need not revamp their policies and procedures just yet, employers are advised to take stock of their current harassment policies to ensure compliance with existing laws. A good place to start might be following our firm's five-step plan to address growing harassment concerns, which can be found here. Additionally, employers should stay abreast of all the federal, state and local legislative initiatives aimed to strengthen sexual harassment laws. We will continue to keep you informed of this bill's progression through the legislative process, as well as any other legislation that gains traction.

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