SULLIVAN & CROMWELL LLP

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New York State Passes Significant Sexual Harassment Legislation.

New Legal Requirements Include Prohibiting Non-Disclosure Clauses Unless It Is the "Complainant's Preference," and Barring Pre-Dispute Arbitration Clauses for Sexual Harassment Claims.

SUMMARY

The 2018-2019 State Budget that was recently signed into law by New York Governor Andrew Cuomo contains several significant provisions addressing workplace sexual harassment. Those changes include: 1) a ban on pre-dispute agreements requiring arbitration to resolve sexual harassment claims "except where inconsistent with federal law" (and as noted below, the Federal Arbitration Act may preempt this prohibition); 2) a requirement that any confidentiality provision in a sexual harassment settlement agreement be at the "complainant's preference," that such preference be memorialized in the settlement agreement, and that the complainant be afforded a 21-day consideration period and seven-day revocation period for any such agreement; 3) a provision extending employer liability for sexual harassment experienced by independent contractors and other non-employees in an employer's workplace; 4) a requirement that all New York State employers (regardless of size) adopt anti-sexual harassment policies and training programs to be promulgated by the Department of Labor or that otherwise meet or exceed certain specified legislative requirements; and 5) a requirement that all State contractors certify when submitting a bid for a State contract that they have adopted anti-sexual harassment policies and training programs. The Bill also requires State officials to reimburse the State or any State agency for amounts paid to a plaintiff based on a finding of intentional wrongdoing in claims of sexual harassment.

PROVISIONS

Prohibition on Use of Pre-Dispute Arbitration Agreements to Resolve Sexual Harassment Claims. The Bill adds Section 7515 to the New York Civil Practice Law and Rules to provide that no written contract shall contain "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 "mandatory arbitration clause" with respect to such claims is null and void. The ban is effective as to contracts entered into on or after July 11, 2018, 90 days after the Bill's enactment into law. A "mandatory arbitration clause" is defined to include contractual language to the "effect 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." The Bill explicitly provides that the ban on mandatory arbitration does not apply as to non-sexual harassment claims and that it does not affect the enforceability of agreements to arbitrate other claims. The Bill applies only to pre-dispute arbitration agreements; parties remain free to agree to arbitration claims after a dispute arises. Collective bargaining agreements may continue to require arbitration of sexual harassment claims.[1] And, as described below, the prohibition may be preempted by the Federal Arbitration Act.

New Requirements for Confidential Treatment of Sexual Harassment Settlements. The Bill adds Section 5-336 to the New York General Obligations Law and Section 5003-b to the New York Civil Practice Law and Rules to provide that, in actions "the factual foundation for which involves sexual harassment," no private settlement agreement or settlement resolving a legal claim may include a confidentiality provision unless "the condition of confidentiality is the complainant's preference" and the complainant's preference is memorialized in the written agreement. In addition, the Bill adopts the time periods for review and revocation required by the Age Discrimination in Employment Act for agreements with persons over age 40: *i.e.*, the complainant must be given at least 21 days to consider an agreement with a confidentiality provision, and a seven-day revocation period following execution of the agreement. These provisions likewise become effective on July 11, 2018.[2]

Extension of Employer Liability for Sexual Harassment to Independent Contractors in the Workplace. The Bill adds a new section 296-d to the New York Executive Law to provide that "[i]t shall be an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in its workplace" in the event the employer, its agents or supervisors "knew or should have known" that its "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace" was subjected to sexual harassment in the workplace and "the employer failed to take immediate and appropriate corrective action." The Bill provides that *respondeat superior* principles—*e.g.*, the extent of the employer's control over the alleged perpetrator—are relevant to considerations of liability for acts of non-employees.[3]

Mandatory Sexual Harassment Prevention Policy and Training. The Bill mandates that the New York Department of Labor (the "DOL"), in consultation with the Division of Human Rights (the "DHR"), create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy. That policy at a minimum must:

- Prohibit sexual harassment and provide examples of conduct that would constitute sexual harassment;
- Include information concerning federal and state statutory provisions applicable to sexual harassment, identify remedies for sexual harassment, and state that there may be applicable local laws;
- Include a standard complaint form;
- Identify a procedure for the timely and confidential investigation of complaints of sexual harassment that provides due process for all parties involved;
- Notify employees of their rights of redress and all available forums for administrative and judicial adjudication of sexual harassment claims;
- 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
- Clearly state that "retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful."[4]

The Bill also requires the DOL, in consultation with the DHR, to develop an interactive sexual harassment training program that, at a minimum, includes:

- An explanation of sexual harassment, consistent with guidance issued by the DOL in consultation with the DHR;
- Examples of conduct constituting sexual harassment;
- Information concerning federal and state statutory provisions applicable to sexual harassment and remedies for sexual harassment; and
- Information concerning rights of redress and all available forums for adjudication of sexual harassment complaints.[5]

The Bill requires all employers, regardless of size, to either adopt the model sexual harassment prevention policy and training program promulgated by the DOL or establish a sexual harassment prevention policy and training program that meets or exceeds its standards. Employers must provide the policy in writing to all employees, and the training program must be provided to employees annually.[6]

Anti-Sexual Harassment Policies and Trainings by State Contractors. The Bill requires State contractors to adopt an anti-sexual harassment policy and to conduct anti-sexual harassment training on an annual basis, and provide a certification that they have done so.[7]

Reimbursement to State by Officials for Amounts Paid by State for Sexual Harassment. The Bill requires State and local government employees to reimburse the government for any portion of a final judgment of personal liability for "intentional wrongdoing related to a claim of sexual harassment."[8]

IMPLICATIONS

No Definition of "Sexual Harassment." Although the Bill repeatedly uses the term "sexual harassment," it does not provide a definition. Thus, the Bill will be interpreted in accordance with court decisions defining the term. The lack of a definition mirrors a related development on the federal level. In President Trump's tax reform bill, a new provision was added to the Internal Revenue Code that eliminates the deductibility of amounts paid in connection with settlement of sexual harassment and sexual abuse claims if the settlement agreement requires nondisclosure on the part of the employee, but no definition of sexual harassment was provided.

Potential Federal Preemption Under the Federal Arbitration Act. The Federal Arbitration Act (the "FAA") establishes a clear Congressional command favoring enforceability of arbitration agreements and has been held to "preempt any state rule discriminating on its face against arbitration – for example, a 'law prohibiting outright the arbitration of a particular type of claim.'"[9] Indeed, the Bill itself contains a carve-out, prohibiting mandatory arbitration agreements for sexual harassment claims "[e]xcept where inconsistent with federal law."[10] Accordingly, if an agreement falls within the FAA, the prohibition on agreements allowing for arbitration of sexual harassment claims arguably would not apply.

Settlements of Cases Involving Multiple Claims. It is not clear how this Bill would affect arbitration of claims in which the plaintiff is asserting both sexual harassment as well as other claims. Presumably the defendant could seek bifurcation of a complaint, with arbitration of the non-harassment claims.

Continued Chipping Away at Arbitration Clauses. Although the Bill's scope is expressly restricted to State law sexual harassment claims, it is related to a number of efforts by employee advocates to limit the use of pre-dispute arbitration provisions in the employment context more generally. The Arbitration Fairness Act of 2017, for example, was a bill introduced in the U.S. Senate in March 2017, but not passed, that would have prohibited a pre-dispute arbitration agreement from being valid or enforceable if it required arbitration of an employment, consumer, antitrust or civil rights dispute. In this context, the Supreme Court's upcoming decision in the consolidated *Epic Systems Corp*. v. *Lewis* cases, which was argued in October 2017, presents the question of whether class-action and collective-action waivers in employment arbitration agreements are enforceable under the FAA, is eagerly anticipated. Those opposing enforcement of pre-dispute arbitration agreements have not had much success in courts or Congress, but efforts such as this in the state courts are ongoing.

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ENDNOTES

[1] S 7507 C, 2017–2018 Leg. Sess. pt. KK, subpt. B §§ 1–2.

[2] *Id.* pt. KK, subpt. D §§ 1–3.

[3] *Id.* pt. KK, subpt. F § 1.

[4] *Id.* pt. KK, subpt. E § 1.

[5] *Id.*

[6] *Id.*

[7] *Id.* pt. KK, subpt. A § 1.

[8] *Id.* pt. KK, subpt. C § 1.

[9] *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017) (quoting *AT & T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 341 (2011)).

[10] S 7507 C, 2017–2018 Leg. Sess. pt. KK, subpt. B § 4.

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