

### **Heads Up, Employers: New York Reacts to the “Time’s Up” Movement by Expanding Protections against Sexual Harassment at Work**

On April 12, 2018, New York State Governor Andrew Cuomo signed into law the 2018-2019 New York State budget, which imposes substantial new obligations on employers with respect to combating sexual harassment in the workplace. Among other things, the law expands the protections against sexual harassment under the New York State Human Rights Law, mandates annual anti-harassment training for all employees, and requires employers to adopt an anti-harassment policy meeting newly-created standards. The provisions also prohibit non-disclosure clauses in settlement agreements relating to workplace sexual harassment claims and ban mandatory arbitration of those claims.

On May 9, 2018, Mayor Bill de Blasio signed into law the Stop Sexual Harassment in NYC Act, which expands anti-discrimination protections under the New York City Human Rights Law. Like the state provisions, the NYC Act also mandates annual anti-harassment training and requires employers to post notices regarding anti-sexual harassment policies.

Taken together, the new state and city laws create significant new requirements for employers relating to workplace sexual harassment. This alert contains a summary of the notable provisions of the two laws.

#### **Changes to New York State Law**

##### *Model Sexual Harassment Prevention Policy and Mandatory Training*

The New York State law requires the New York State Department of Labor and Division of Human Rights to develop both a model sexual harassment prevention policy and a model sexual harassment prevention training program for employers’ use. In the most significant change for employers, effective October 9, 2018, all employers are required to either adopt the agencies’ model policy and training program or to establish their own policy and training program that meets or exceeds the minimum standards set by the model policy and training.

Among other things, the policy must include a standard complaint form, information on employee rights and all available administrative and judicial forums for adjudicating sexual harassment complaints, and a procedure for the timely and confidential investigation of complaints that ensures due process for all parties. A copy of the employer’s anti-harassment policy must be provided to all employees.

The mandatory training must be provided to employees at least once annually. As noted above, it must contain at least the information provided in the model training to be issued by the New York State Department of Labor and Division of Human Rights.

##### *New York State Human Rights Law Expanded to Protect “Non-Employees”*

Effective immediately, the New York State Human Rights Law has been expanded to provide workplace protections against sexual harassment of “non-employees,” including independent contractors, consultants, vendors, subcontractors, and persons providing services pursuant to a contract. An employer may be found liable for failing to take corrective action “when the employer, its agents or supervisors knew or should have known that [a] non-employee was subjected

to sexual harassment” in the workplace. This new obligation is in addition to the existing requirement that employers prevent harassment of their employees.

#### *Prohibition on Non-Disclosure Clauses and Mandatory Arbitration*

Effective July 11, 2018, New York State employers are no longer permitted to require a non-disclosure clause as part of a settlement of a claim whose “factual foundation” “involves sexual harassment.” An employer may include such a clause only at the employee’s request, which must be memorialized in writing and signed by all parties. Additionally, if a non-disclosure clause is included, the employee must be given 21 days to consider the terms of the agreement before signing it and seven days to revoke (just like the requirements for a valid release under the Age Discrimination in Employment Act). The non-disclosure clause does not become enforceable until after the seven day revocation period has elapsed.

Also effective July 11, 2018, employers are prohibited from requiring mandatory binding arbitration of sexual harassment claims. Mandatory arbitration provisions will be considered “null and void” except when included as part of a collectively bargained agreement, where they remain enforceable. This law may ultimately be preempted by the Federal Arbitration Act, but for now, New York employers should assume that these agreements are no longer binding.

#### **New York City’s “Stop Sexual Harassment in NYC Act”**

##### *Expansion of Anti-Discrimination Protections*

The anti-discrimination provisions of the New York City Human Rights Law previously applied only to employers with four or more employees. Effective immediately, the new City law amends the Human Rights Law to extend its anti-sexual harassment provisions to all employers regardless of size.

The law also revises the City law to extend the statute of limitations from one to three years for the filing of administrative gender-based harassment complaints. This extended limitations period matches the limitations period for filing gender-based harassment claims in court.

##### *Notice of Anti-Harassment Policies*

Effective September 6, 2018, the new City law requires employers to post an anti-sexual harassment rights and responsibilities poster in the workplace. Employers must also distribute an information sheet on sexual harassment to employees when hired. The New York City Commission on Human Rights (the “Commission”) is responsible for developing these materials, which will be published on its website.

##### *Mandatory Training*

Effective April 1, 2019, under the new City law, employers with 15 or more employees must conduct annual interactive anti-sexual harassment training for all employees working 80 or more hours per year in New York City. Trainings must include an explanation of sexual harassment as an unlawful form of discrimination, practical examples of what constitutes sexual harassment, education on bystander intervention, and detailed explanations of complaint procedures, among other things.

Trainings are not required to be live or facilitated by an in-person instructor, but must be interactive and should involve “participatory teaching,” including trainer-trainee interactions, use of audio-visual aids, and computer and other online training programs. Trainings must also provide information on state and federal laws concerning sexual harassment and rights and remedies with respect to sexual harassment claims. Finally, trainings must address conduct by supervisors and additional responsibilities for supervisors. As with the State law, the Commission will publish a model training module

online that employers may use. It is unclear at this point how the model State and City trainings will differ.

### **Take-Aways for Employers**

To prepare for these changes in New York laws, employers should carefully review their current policies and practices. To ensure compliance with the new rules, employers should also:

- Revise their sexual harassment policies to meet the standards established in the New York State law once the model policy is provided by the State;
- Adopt annual sexual harassment trainings that meet the minimum standards required by the State and City once the respective model trainings are published;
- Post the Commission's forthcoming sexual harassment rights and responsibilities poster in the workplace;
- Provide newly hired employees with the Commission's forthcoming information sheet on sexual harassment;
- Review all employment agreements and separation or settlement agreements to ensure they meet the new requirements under State law; and
- Train and inform all human resources personnel on the new requirements under both City and State law.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

<u><a href="#">Lisa E. Cleary</a></u>	212-336-2159	<u><a href="mailto:lecleary@pbwt.com">lecleary@pbwt.com</a></u>
<u><a href="#">Catherine A. Williams</a></u>	212-336-2207	<u><a href="mailto:cawilliams@pbwt.com">cawilliams@pbwt.com</a></u>
<u><a href="#">Sara Arrow</a></u>	212-336-2031	<u><a href="mailto:sarrow@pbwt.com">sarrow@pbwt.com</a></u>
<u><a href="#">Helen P. O'Reilly</a></u>	212-336-2739	<u><a href="mailto:horeilly@pbwt.com">horeilly@pbwt.com</a></u>
<u><a href="#">Adam E. Pinto</a></u>	212-336-2156	<u><a href="mailto:apinto@pbwt.com">apinto@pbwt.com</a></u>

To subscribe to any of our publications, call us at 212.336.2813, email [info@pbwt.com](mailto:info@pbwt.com) or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions. © 2018 Patterson Belknap Webb & Tyler LLP