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NYS Sexual Harassment Prevention Law

And Other Changes to NYS Laws Impacting Employers

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Founding partners Karlee S. Bolaños and William Q. Lowe both have relatively rare and exceptionally well-earned experience. Veterans in the areas of Labor, Employment, and Corporate law, these top-notch attorneys will work with you, for you, and beside you — always on your team.

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Agenda

- Sexual Harassment Prevention Law – Key Requirements
  - Sexual Harassment Prevention Policy
  - Sexual Harassment Prevention Training Program
  - Recent Changes to the Sexual Harassment Prevention Law
- Other Recent Changes to New York State Laws Impacting EEO Compliance

Sexual Harassment Prevention Requirements Effective October 9, 2018

- April 12, 2018, the governor signed into law a budget that included several changes and additions to workplace anti-sexual harassment law.
- The law requires all employers to adopt a ***sexual harassment prevention policy*** as well as a ***sexual harassment prevention training program***.

  - **Policy**: The amendments require employers to either adopt the NYS model policy or establish an anti-sexual harassment prevention policy that "equals or exceeds" the model policy.
  - **Training**: The amended law also requires employers to conduct sexual harassment prevention training for “all employees” on an annual basis. Employers may adopt the NYS model training program or produce their own program that "equals or exceeds" the minimum standards in the model program.

New York's Model Policy

- At a minimum, the policy must:
  - Prohibit sexual harassment
  - Provide examples of prohibited conduct that would constitute unlawful sexual harassment
  - Include information concerning the federal and state laws about sexual harassment and remedies available to those who experience sexual harassment
  - Include a statement regarding applicable local laws and contacting law enforcement
  - Include a standard complaint form
  - Include a procedure for the timely and confidential investigation of complaints and due process for all parties
  - Include information about rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
  - 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
  - Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is prohibited

New York's Model Training Program

- Every employer in New York State is required to provide employees with sexual harassment prevention training.
- An employer that does not use the model training developed by the Department of Labor and Division of Human Rights must ensure that the training that they use meets or exceeds minimum standards.
- Model training materials are available to employers to download at https://www.ny.gov/combating-sexual-harassment-workplace/employers

New York's Model Training Program

- At a minimum, the training program must:
  - Be interactive
  - Define and explain what sexual harassment is
  - Include examples of unlawful sexual harassment
  - Include information concerning the federal and state laws about sexual harassment and remedies available to those who experience it
  - Information about individuals' rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
  - Include information addressing conduct by supervisors and any additional responsibilities for supervisors

Recent Change: Annual Sexual Harassment Prevention Training Requirements Have Been Further Enhanced

- NYS recently updated its FAQ on the training requirements.
  - Any online training must have ***questions at the end of every section*** and ***employees must answer the questions correctly to move on***.
- The following are additions to how the FAQ describes “interactive training”:
  - If the training is web-based, it has questions at the end of a section and the employee must select the right answer
  - If the training is web-based, the employees have an option to submit a question online and receive an answer immediately or in a timely manner
  - In an in-person or live training, the presenter asks the employees questions or gives them time throughout the presentation to ask questions
  - Web-based or in-person trainings that provide a Feedback Survey for employees to turn in after they have completed the training

Recent Change: Sexual Harassment Prevention Notice

- The update to the FAQ also established a new “Sexual Harassment Prevention Notice” requirement.
- Employers are required to provide new employees with a sexual harassment prevention notice on their first date of employment or before *and* a notice must be provided to all other employees once per year.
- The notice must be in writing but can be delivered digitally (including via email).
- The notice must link to or include your sexual harassment prevention policy and the complete training materials (as an attachment or printed copy).
  - “Training materials” are defined as “any printed materials, scripts, Q&As, outlines, handouts, PowerPoint slides, etc.”
- The FAQ states that if you are using an online training program, a link to such materials is sufficient, but not just a link to begin the training—it must be a link to a copy of training materials including Q&A.
- Employers must make reasonable efforts to provide the information covered in the training in the notice.
- This notice requirement does not alleviate the need for interactive training. So, you still must provide annual interactive training PLUS you must attach some sort of static copies of training materials for the new hire notice and with the annual notices for all employees.

Recent Change: Sexual Harassment Prevention Notice

- Employers must take immediate steps to comply with new guidance.
- Under the FAQ:
  - Employers are liable for conduct of new hires the ***first moment the employee works for the employer***.
  - Employees ***instantly*** become employer liability, ignoring realities regarding new hire orientation and on-boarding.
- New source of potential liability.
- Requires existing new hire materials to be reviewed immediately.

Sample Notice

For employers using a comprehensive non-discrimination/non-harassment policy in lieu of a specific sexual harassment prevention policy

Dear Employee,

This is your annual Sexual Harassment Prevention Notice. The purpose of this notice is to remind you that sexual harassment is a form of sex discrimination and is a violation of the Company's policy and is unlawful. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender. Sexual harassment is unlawful when it subjects an individual to inferior terms, conditions, or privileges of employment. Harassment need not be severe or pervasive to be unlawful and can be any harassing conduct that consists of more than petty slights or trivial inconveniences. Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when 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 reporting individual is not the intended target of the sexual harassment; 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.

Also attached is a copy of the Company's Non-Harassment and Non-Discrimination Policy, which includes sexual harassment prohibitions. The Company's policy specifically prohibits sexual harassment and sex discrimination in addition to prohibiting all forms of harassment and discrimination based on any protected characteristic.

One of the most important aspects of the Company's Non-Harassment Policy is the instruction that any employee who feels harassed report any violation of this policy immediately so that the violation may be promptly corrected. Any harassing conduct, even a single incident, can be addressed under the Company's complaint reporting mechanism detailed in the Policy.

For existing hires: Also attached are copies of training materials from the sexual harassment training class you attended this year.

For new hires: The attached training materials and policy are the materials provided at the training course you have attended or will soon be attending.

Sample Notice

For employers using a stand-alone sexual harassment prevention policy

Dear Employee,

This is your annual Sexual Harassment Prevention Notice. The purpose of this notice is to remind you that sexual harassment is a form of sex discrimination and is a violation of Company policy and is unlawful. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender. Sexual harassment is unlawful when it subjects an individual to inferior terms, conditions, or privileges of employment. Harassment need not be severe or pervasive to be unlawful and can be any harassing conduct that consists of more than petty slights or trivial inconveniences. Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when 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 reporting individual is not the intended target of the sexual harassment; 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.

Attached is a copy of the Company's Sexual Harassment Prevention Policy. The policy prohibits sexual harassment and sex discrimination. Remember that the Company also prohibits any form of harassment and discrimination based on any protected characteristic.

One of the most important aspects of the Company's Sexual Harassment Prevention Policy is the instruction that any employee who feels sexually harassed report any violation of this policy immediately so that the violation may be promptly corrected. Any harassing conduct, even a single incident, can be addressed under the Company's complaint reporting mechanism set forth in the Policy.

For existing hires: Also attached are copies of training materials from the sexual harassment training class you attended this year.

For new hires: The attached training materials and policy are the materials provided at the training course you have attended or will soon be attending.

Recent Change: Lowering of the Discrimination and Harassment Legal Standard

- The standard is no longer “severe and pervasive”. Now, any behavior beyond a “Petty Slight” or “Trivial Inconvenience” may be illegal.
- Effective October 11, 2019, conduct may be unlawful discrimination or harassment if it would be considered more than a “petty slight” or “trivial inconvenience” by a reasonable victim of discrimination or harassment.
- This reduced legal threshold for claims means that supervisory employees must be alert to even the pettiest complaints or slightest hint of discriminatory or harassing conduct and to report the conduct immediately. All concerns and complaints, no matter how trivial they may seem, must be reported to the Human Resources Department and/or to the EEO Manager directly for immediate investigation.
- Both your annual sexual harassment prevention training program and non-harassment policy will need an update because the legal definition of sexual harassment has changed.

Recent Change: The Regulations Outline Investigation Requirements

- In looking at the State's new policy and bullet points about investigations from the State's sexual harassment website, it appears that the State has a "model investigation" report envisioned.
- Your investigations must meet the requirements for sexual harassment investigations.

Recent Change: Take Away Action Items to Comply With the New NYS Laws

- Complete an independent review of existing non-harassment policies, procedures, and training programs.
- Make sure that your company has a compliant Sexual Harassment Prevention Policy and Complaint Form
- Post the policy in every work location
- Develop a plan for completing employee training
- Issue annual notices
- Develop a model investigation report and investigation protocols and processes
- Train your HR staff and/or EEO manager or hire a third-party service

Recent Change: Employees Do Not Need to Complain Internally Before Bringing Claims

- Previously, employers could defend against harassment claims by showing that a complaining employee failed to take advantage of the employer's internal reporting mechanisms.
- Under the new law, the fact that a complaining employee did not make a complaint about the harassment to their employer will not be determinative of whether the employer can be held liable.
- The change took effect for alleged incidents of harassment occurring on or after October 11, 2019.
- Do not wait for or require an employee to file an internal complaint form before investigating.

Recent Change: Contractors and Other Individuals Protected

- The NYSHRL was amended to protect "non-employees" in employers' workplaces. For example, contractors, vendors, consultants, and similar individuals "providing services" to the employer may now claim discrimination and/or harassment against the employer.
- The change took effect for alleged instances of harassment or discrimination occurring on or after October 11, 2019.

Recent Change: Greater Statute of Limitations for Sexual Harassment Claims

- The NYSHRL was amended to change the statute of limitations for sexual harassment claims filed with the State Division of Human Rights to three years, an increase from the current one-year limitation period.
- This special rule is only related to sexual harassment claims—other types of harassment claims, like racial harassment, are still subject to a one-year statute of limitations.
- The new three-year statute of limitations for sexual harassment goes into effect next year, on August 12, 2020.

Recent Change: Complainants May be Entitled to Attorney's Fees and Punitive Damages

- Marking a departure from several other employment-related laws, the expanded Human Rights Law now states that the Division of Human Rights and the courts may, in their discretion, "award reasonable attorney's fees" to the prevailing party in harassment claims.
- This includes prevailing employers. However, prevailing employers will have to establish that the claim was "frivolous" in order to receive an award of attorney's fees.
- Additionally, employees complaining of discrimination will be able to recover "punitive" damages, in addition to compensatory damages.
- These cases may become extraordinarily costly and must be avoided.
- The change took effect for alleged instances of harassment occurring on or after October 11, 2019.

Other Notable Legal Updates

- New York has made some additional significant legal changes to the New York State Human Rights Law (NYSHRL)
  - Religious Attire, Clothing, and Facial Hair Protections Strengthened
  - Discrimination Based on Traits Historically Associated With Race Prohibited
  - Pay Equity Issues and Salary History Ban
  - Domestic Violence Victim Accommodations
  - Nondisclosure Agreements and Confidentiality Provisions
  - New Legislation Prohibits Employment Discrimination Based on Reproductive Health Decision Making

New York State Prohibits Discrimination Based on Religious Attire and Facial Hair

- For many years, the NYSHRL has prohibited employers from requiring employees to forego any sincerely held practice of their religion, unless the employer could demonstrate that accommodating the practice would present an undue hardship on the employer's business.
- Effective October 8, 2019, this law was amended to specifically add that the wearing of any attire, clothing, or facial hair in accordance with religious requirements may qualify as a sincerely held religious practice.
- Any specific policies or rules you may have related to employee appearance, attire, or facial hair, especially any prohibitions on facial hair or certain articles of clothing/attire, must be vetted through Human Resources and your lawyer since such practices may run afoul of this new legal protection.
- You likely need to update your: Discrimination and Harassment Policy; policy on employee appearance and attire; and Religious Accommodation Request Form to comply with these new requirements.

New York State Bans Race Discrimination Based on Traits Historically Associated With Race

- Effective July 12, 2019, the definition of “race” in discrimination and harassment claims was amended.
- The protected category of “race” now includes traits historically associated with race, including but not limited to, hair texture and protective hairstyles.
- “Protective hairstyles” are defined by the law as hairstyles such as “braids, locks, and twists.” Employee’s may have certain rights to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities.
- Any specific policies or rules related to employee hairstyles or other traits associated with race must be carefully vetted since such practices may run afoul of this legal protection for employees.
- You may need to update your Discrimination and Harassment Policy to add “traits historically associated with race” to the definition of racial discrimination and racial harassment.

Pay Equity Protections Are Expanding

- The pay gap—paying women and other historically discriminated against classes of people less for the same or substantially similar work—has increasingly come into the media spotlight.
- Given the media attention, politicians have become interested and there have been legal changes as a result.
- Applicants, employees, and employee union representatives and/or their lawyers are also paying attention!

Expansions to New York's Pay Equity Law

- On July 10, 2019, the Governor signed legislation which:
  - (1) Significantly expands the protections of New York's Pay Equity Law, which previously required equal pay for women and men performing "equal work"; and
  - (2) Imposed a ban on inquiries into an applicant's salary history.
- The new laws takes effect on October 8, 2019.

Expansions to New York's Pay Equity Law

- The new pay equity law requires equal pay among employees who perform "substantially similar" work, when considering skill, effort, responsibility, and working conditions.
- This means that employers cannot rely on comparisons among those who share the ***same job title*** to ensure pay equity. Now, your wage equity analysis must encompass the wage rates among employees who hold different, though ***"substantially similar," roles***.
- Employers must analyze groupings or classes of jobs, rather than individual positions or job titles.

Expansions to New York's Pay Equity Law

- The old law applied only to gender, based on equal work.
- Now, the amended law also prohibits any differentials in pay because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, and/or domestic violence victim status.
- In addition to continuing to prohibit differentials among individuals who perform "equal work," the amendment also prohibits differentials among individuals who perform "substantially similar work."

Expansions to New York's Pay Equity Law—Specific Prohibitions

- This amendment prohibits all employers from paying an employee in one or more protected class or classes at a wage rate that is less than the rate at which an employee without that protected status is paid for:
  - equal work on a job, which requires equal skill, effort, and responsibility, and which is performed under similar working conditions; or
  - substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

Expansions to New York's Pay Equity Law—How to Determine Similarity

- When determining substantial similarity employers should balance several factors:
  - Skill: Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two clerk jobs could be considered similar even if one of the job holders has a master's degree in biology, since that degree would not be required for the job.
  - Effort: The amount of physical or mental exertion needed to perform the job.
  - Job Duties
  - Responsibility: The degree of accountability required in performing the job. Minor differences in responsibility will not justify a pay differential.
  - Working Conditions: Typically encompasses physical surroundings and hazards.
  - Supervisory Responsibilities
  - The experience, education, training, licenses or certifications specifically required to perform each job
- Consider utilizing the USDOL Standard Occupational Classification system to group and classify jobs and occupations. The purpose of the SOC system is to organize occupational data and classify workers into distinct occupational categories. The SOC system generally classifies occupations based on the skills, education, and training required to perform the job.

New York's Salary History Ban

- At the same time the pay equity law was amended, NYS enacted a new salary history law prohibition.
- This law prohibits employers from asking **applicants** or ***current employees*** for their wage or salary history as a condition of consideration for employment or promotion, and from asking other employers for that information.
- Employers also cannot refuse to consider, employ, or promote an applicant or current employee based on their salary history or their refusal to provide their salary history.
- The law also forbids employers from relying on salary history in setting an applicant's pay rate.
- This does not prohibit individuals from voluntarily disclosing such history, including for the purpose of negotiating their wages.
- An employer may verify an individual's pay history if the applicant rejects an existing offer of compensation while citing to his or her prior salary.
- The salary history ban took effect on January 6, 2020.

Domestic Violence Victim Accommodation

New York Increased Employment Protections for Victims of Domestic Violence

- Beginning on November 18, 2019, employers are required to provide reasonable accommodations (time off from work) to employees who are victims of domestic violence or parents of children who are victims of domestic violence, unless such accommodation would cause the employer to suffer an undue hardship.
- The time off is only allowable for certain purposes enumerated in the statute, such as, to seek medical attention or psychological counseling for injuries caused by domestic violence, to obtain shelter services, crisis services, safety planning, or legal advice in relations to domestic violence.
- Employees granted leave due to domestic violence will be required to utilize paid vacation or other PTO, if available, although certain absences may qualify for sick time (such as medical appointments for injuries). Any absences that cannot be charged to a paid leave code must be treated as unpaid leave under the law.
- Employees must provide reasonable advance notice if they plan to take this type of leave. If advance notice is not feasible, the employer may require an employee who takes such leave to provide additional certification for the absence(s).
- You should create a process to obtain the appropriate certification.
- If an employee requests an accommodation related to domestic violence, you should create a process for departments or managers to work with Human Resources to process the request.
- You should also develop eligibility and certification forms and, of course, update your policy regarding domestic violence victim status or create a policy if you do not already have one.

Use of Nondisclosure Agreements and Confidentiality Provisions Limited

- Last year, New York state limited the use of nondisclosure and confidentiality agreements used in settlement of sexual harassment claims.
- The newly amended law expands that limitation to ***all settlements involving claims of discrimination and/or harassment based on any protected characteristic***, not just sexual harassment.
- The new limitation thus prevents employers from insisting on confidentiality provisions in any settlements, unless confidentiality "is the complainant's preference." If it is, the complainant must have 21 days to consider the employer's confidentiality provision and will have 7 days after signing it to revoke their acceptance.
- The 21/7 rule for many years only applied to age releases.
- The change took effect on October 11, 2019.

New Legislation Prohibits Employment Discrimination Based on Reproductive Health Decision Making

- On November 8, 2019, Governor Cuomo signed legislation that provides protections for employees based on "reproductive health decision making." Codified in New York Labor Law Section 203-e.
- "Reproductive health decision making" includes, but is not limited to, "the decision to use or access a particular drug, device or medical service" related to reproductive health.
- Employers may not:
  - Take adverse employment actions against employees based on decisions such as obtaining fertility-related medical procedures, using birth control drugs or contraceptive devices, or having an abortion
  - Discriminate against or take retaliatory action against an employee with respect to compensation, terms, conditions, or privileges of employment because of or based on the employee's, or his/her dependent's, reproductive health decision making
  - Access personal information regarding an employee or an employee's dependent's reproductive health decision making without the employee's prior informed affirmative written consent
  - Require employees to sign waivers or other documents that attempts to deny the employee the right to make their own reproductive health decisions
- The law gives employees the right to file a claim in court against an employer alleged to have violated the prohibition on discrimination based on reproductive health decision making.
- The law requires employers to include in the employee handbook a notice of employee rights and remedies under New York Labor Law Section 203-e.

Key Takeaways

- In light of these changes in New York laws, employers may want to carefully review their current practices and consider taking the following steps:
  - Informing and training all employees involved with employee relations and anyone with supervisory responsibilities about the new requirements;
  - Reviewing all agreements, including, but not limited to, employment, separation, and settlement agreements, to ensure any nondisclosure clauses meet the requirements of the new law;
  - Ensuring that all employees have received the required sexual harassment prevention training, the required notice regarding the employer's policy and the information presented in the training program;
  - Evaluating existing pay practices to ensure compliance with the expanded pay equity requirement;
  - Audit employee salaries/pay;
  - Create a complaint process for pay increases;
  - Update policies and handbooks; and
  - Draft accommodation request forms.

Questions?

If you would like a copy of these materials, please email a request to **bzelazny@bolanoslowe.com**

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thank you

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