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ALERT
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New York – Sexual Harassment Prevention Reminders

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In April 2018, New York State enacted a number of laws designed to heighten obligations on employers to prevent sexual harassment in the workplace. Some of the provisions are scheduled to take effect on July 11, 2018; the remainder, including the requirement concerning mandatory sexual harassment training, will take effect on October 9, 2018. (See our prior alert, New Sexual Harassment Prevention Requirements for New York Employers, April 5, 2018.)

Taking Effect Now

Employers should take immediate steps to ensure they are prepared for two important features of the sexual harassment prevention law that will take effect on July 11.

First, contracts entered into on or after July 11 cannot contain clauses that require mandatory arbitration of sexual harassment claims unless the arbitration provision is part of a collective bargaining agreement. Whether this ban on mandatory arbitration of sexual harassment claims outside the collective bargaining context violates the Federal Arbitration Act remains to be seen. Nevertheless, it would be prudent for New York employers who enter into arbitration agreements with their employees on or after July 11 to carve-out a provision that would enable the employee to bring any sexual harassment complaint in a court rather than in arbitration. Failing to include such a carve-out provision would be a violation of New York law. Any arbitration agreement entered into prior to July 11 is not impacted by this change in New York law, and under those older agreements employers can require arbitration of a sexual harassment claim even if the incident giving rise to the claim occurs after July 11.

Second, certain nondisclosure clauses in settlement or severance agreements executed on or after July 11 that resolve sexual harassment claims will be null and void unless it is the complainant's preference to include the nondisclosure clause. To ensure that the complainant prefers to include a non-disclosure clause, the complainant must be given 21 days to consider the clause before signing the agreement, and be given 7 days to revoke the agreement after signing it. If this 21/7 procedure is followed, then it will be assumed that it was the complainant's preference to include the nondisclosure provision in the agreement at issue.

In light of these changes, all New York employers should:

- Revise their standard separation, settlement, and related agreements to include a 21-day consideration period and 7-day revocation period when the employee at issue has raised claims of sexual harassment in order to ensure any nondisclosure provision in the

agreement remains in effect and enforceable;

- Consult with counsel (and not rely on old templates) to discuss appropriate language to insert into separation or severance agreements if such agreements contain nondisclosure provisions and release sexual harassment claims even if the departing employee has not affirmatively raised allegations of sexual harassment;

- Revise all employment agreements, handbooks, offer letters, applications, and other documents that contain mandatory arbitration provisions to carve out sexual harassment claims so that such claims are not subject to arbitration and instead may be filed in court.

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