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TIME IS RUNNING OUT!

New York's Mandatory Sexual Harassment Prevention Training

For ALL EMPLOYEES Must Be Complete By October 9, 2019

Every New York employer is required to provide all employees performing work in New York with sexual harassment prevention training. By law, all employees must be trained by **October 9, 2019,** and at least once a year thereafter. New hires must receive the training as soon as possible. The training must:

- be interactive; simply watching a video is not enough;
- include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- include examples of conduct that would constitute unlawful sexual harassment;
- include information regarding the federal and state statutory provisions concerning sexual harassment and remedies available to victims;
- include information regarding employees' rights of redress and all available forums for adjudicating complaints; and
- include information addressing conduct by supervisors and additional reporting responsibilities for such supervisors.

If you have not yet trained your employees, now is the time to act; we can help. Contact Matt Miller (chair of our Employment Law Practice Group) or Jim O'Connor to set up your company's training today.

CHANGES TO NEW YORK'S ANTI-HARASSMENT AND ANTI-DISCRIMINATION LAWS

On August 12, 2019, Governor Cuomo signed new legislative amendments that made wholesale changes to New York's anti-harassment and anti-discrimination laws for the second time in as many years. In some respects, these new amendments are even more sweeping than last year's changes. The main takeaways from this newest round of changes are:

Effective August 12, 2019

- In a clear directive to New York Courts and the Division of Human Rights, the new legislative amendments provide that the New York Human Rights Law must be **construed liberally**, regardless of the federal civil rights law and regardless of any interpretation of similar language used in the federal civil rights law. Moreover, any exceptions and exemptions (i.e., employer defenses) from the provisions of the Human Rights Law must "be **construed narrowly** in order to maximize deterrence of discriminatory conduct."

Effective October 11, 2019

- Employees (plaintiffs) no longer will need to prove that the any type of harassment or discrimination was "severe or pervasive," thus lowering the standard needed for employees to prevail and recover damages, and more difficult for employers to defend such state law based claims.

- Employers no longer will be able to assert the so-called "Faragher-Ellerth" defense (that the employer exercised reasonable care to prevent and promptly correct sexually harassing behaviors, and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm).

- Employers no longer will be able to escape liability even if the complainant fails to report the harassment.

- Employers no longer will be able to escape liability even if the complainant refuses to participate in an internal investigation into his/her complaints of harassment.

- Non-disclosure agreements (NDAs) related to potential future claims of harassment or discrimination and that would prevent the disclosure of the underlying facts and circumstances of the claim will be void, unless the worker is notified he or she can still talk to a reporting agency.

- NDAs related to past or present claims of all types of harassment and discrimination and that would prevent the disclosure of the underlying facts and circumstances of the claim will be void, unless the plaintiff prefers to sign such an NDA. Employers may still require that other terms and conditions of settlements or releases related to past or present claims be confidential.

- Last year's prohibition on arbitration clauses will now apply to all discrimination claims (not just sexual harassment). [1]

- Claimants will now be allowed to recover punitive damages in all cases of claims of employment discrimination involving private employers, when the circumstances justify such an award.

- The prevailing party will now be entitled to recover reasonable attorneys' fees in all employment discrimination claims.

- The New York State Attorney General's Office will be required to prosecute all discrimination claims where requested by the Commissioner of the Department of Labor.

Effective February 8, 2020

- The Human Rights Law will now apply to employers of all sizes.

Effective August 12, 2020

- The statute of limitations for complainants to file sexual harassment or any other type of discrimination claim with the New York State Division of Human Rights will increase from one (1) to three (3) years.

In sum, soon employees who file harassment or discrimination claims against their employers will be far more likely to succeed in establishing liability and recovering damages. Moreover, the amount of damages and fees that will be available to employees will significantly increase.

Best Practices

- Talk to your attorney and insurance broker, and get Employment Practices Liability Insurance (EPLI) in place;

- Take every complaint seriously, even if it's verbal, said in passing, or no one objects to the conduct;

- Use caution when drafting releases, settlement agreements, severance agreements, NDAs, and arbitration agreements;

- Investigate and document everything when a complaint is raised; and

- Be prepared to take prompt remedial action.

[1] In July 2019, a federal judge ruled that an agreement to arbitrate sexual harassment claims is enforceable despite the new law prohibiting mandatory arbitration agreements covering sexual harassment claims.

Conclusion

Review your sexual harassment and anti-discrimination policies now and confirm that each complies with state law. Also, make sure all employees receive the mandatory interactive sexual harassment prevention training on or before the October 9, 2019 deadline, and annually thereafter. Being proactive may limit your exposure to claims which, under the new legislation, will be more difficult to defend. As always, Matt Miller, or any of the Rupp Baase employment attorneys can assist you with any questions.

NEW YORK BANS DISCRIMINATION BASED ON NATURAL HAIRSTYLES

On July 12, 2019, Governor Cuomo signed legislation amending both the New York State Human Rights Law and Dignity for All Students Act to add protections for employees against discrimination based on traits historically associated with race, including hair texture and protective hairstyles such as braids, locks, and twists. The law, which took effect immediately, is called the CROWN Act (Creating a Respectful and Open World for Natural Hair), and amended the definition of "race" in the Human Rights Law, among other things.

Review your handbooks and policies to ensure that any grooming policies are compliant and up to date.