#MeToo Prompts Stiffer Sexual Harassment Laws

Labor & Employment Law Update

on July 6, 2018

In January we reported on a change in federal tax law aimed at discouraging confidentiality in sexual harassment and abuse settlements. Since then Tennessee, Washington, New York, and New York City have enacted sexual harassment prevention measures including discouraging confidential settlements.

In **Tennessee** and **Washington** it is now unlawful to condition employment on an agreement not to disclose workplace sexual harassment although confidential settlements are still permitted in both states. The Washington state law further clarifies that non-disclosure policies and agreements do not prevent discovery or witness testimony in administrative or civil judicial actions and tasks the state's Human Rights Commission with developing model policies and best practices to prevent sexual harassment.

New York recently passed an aggressive state-wide anti-harassment law which mandates annual training, prohibits mandatory arbitration of sex harassment claims, and severely limits an employer's ability to keep the underlying facts of such claims confidential as follows:

- Effective Immediately Employers must protect non-employees in their workplace from sexual harassment and are liable to non-employees (i.e. contractors, subcontractors, vendors, consultants or others providing services) if the employer's agents knew or should have known of the harassment and "failed to take immediate and appropriate corrective action."
- Effective 7/11/2018
  - It becomes unlawful to require employees to arbitrate sexual harassment claims (this provision will likely be challenged as violating the Federal Arbitration Act).
  - It becomes unlawful to require confidentiality as to the *facts and circumstances* underlying a claim of sexual harassment *unless confidentiality is the complainant's preference.* If the complainant indicates he or she prefers confidentiality, the employer must wait 21 days while the complainant considers the proposed confidentiality provision and, if the complainant chooses to accept the provision, the complainant must be allowed seven days to revoke the agreement. Note, unlike the ADEA, the NY State law does not appear to allow the complainant to waive any part of

the 21 day consideration period.

- By 10/9/2018 employers in the state must (1) adopt a written sexual harassment policy and (2) provide "interactive" sexual harassment training to all employees annually. Both the policy and the training must meet the strict standards set forth in the statute.

New York City enacted its own ordinance which extends the time period for filing sexual harassment complaints to 3 years; expands the prohibition of sexual harassment to all employment *and independent contractor* relationships (unless the contractor is itself an employer) regardless of number of employees; effective 9/6/2018 will require employers to display a new mandatory poster and provide an information sheet to all employees upon hire; and effective 4/1/2019 will require employers to provide annual "interactive" sexual harassment training which meets the minimum standards outlined in the ordinance to all employees (including managers, supervisors and interns).

Employers with operations in New York must act now to ensure compliance. Others should remain alert as many other jurisdictions are considering similar measures.