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THE LATEST LEGISLATIVE RESPONSES TO #METOO: NEW REQUIREMENTS FOR SEXUAL HARASSMENT TRAINING, ARBITRATION AND SETTLEMENT AGREEMENTS IN NEW YORK AND EVOLVING LEGISLATION IN OTHER STATES

To Our Clients and Friends:

Against a backdrop of increased national focus on sexual harassment in the workplace, New York recently enacted a law requiring employers to provide employees with annual sexual harassment training, prohibiting mandatory arbitration of sexual harassment claims, and restricting the use of confidentiality provisions in settlement agreements. Similar proposals have been enacted or are pending in numerous other states.

TRAINING REQUIREMENTS

New York's new training requirement, which is included in the state budget for FY18–19,[1] mandates that employers provide annual interactive sexual harassment training to all employees by October 9, 2018. Governor Cuomo signed the budget bill on April 12, 2018. The law directs the New York State Department of Labor and New York State Division of Human Rights to "produce a model sexual harassment prevention training program to prevent sexual harassment in the workplace." All employers must either "utilize the model sexual harassment prevention training program" or "establish a training program . . . that equals or exceeds the minimum standards provided by such model training." Employers must provide such training "to all employees on an annual basis."

The law also tasks the Department of Labor and Division of Human Rights with publishing a "model sexual harassment prevention guidance document and sexual harassment prevention policy." Employers must either adopt the model policy or establish an equivalent policy, and must provide the policy "to all employees in writing." Further, the legislation requires all contractors submitting a bid to the State or a state agency under competitive bidding laws to certify, "under penalty of perjury, that the bidder has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees."

Similar legislative proposals are pending in several other states. Delaware is considering a bill that would require employers with fifty or more employees to provide at least two hours of sexual harassment training to all supervisory employees every two years.[2] A Pennsylvania bill would require employers to provide interactive sexual harassment training to "all current employees" every two years, and would require employers to provide "additional interactive training" to all supervisors.[3] And California and Connecticut—states that already impose mandatory sexual harassment training obligations on employers—are considering strengthening their previously enacted laws. Under current California and

Connecticut law, employers with fifty or more employees must provide sexual harassment training to supervisors every two years. Connecticut proposals would reduce the number of employees to fifteen[4] or to three,[5] and would extend training to supervisory *and* nonsupervisory employees. A California proposal would reduce the number to five or more employees and extend training to all employees.[6] A separate California bill would require employers with fifty or more employees to "maintain records of employee complaints of sexual harassment for [ten] years."[7]

ARBITRATION AND CONFIDENTIALITY AGREEMENTS

New York's recently enacted law also limits the use of arbitration and nondisclosure agreements with respect to sexual harassment claims. The law prohibits employers from including in any written contract "any clause or provision . . . which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment."[8] The prohibition does not apply "where inconsistent with federal law," and it does not apply to contracts entered into before the bill's enactment. The law also prohibits employers from including in any settlement agreement, "the factual foundation for which involves sexual harassment, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action." A confidentiality clause may be included where "the condition of confidentiality is the complainant's preference." Like the federal requirements for a valid release of age discrimination claims, the complainant must have twenty-one days to consider the non-disclosure clause, and may revoke the agreement within seven days after signing.

In March 2018, the State of Washington enacted similar restrictions. One Washington law voids any provision in an employment contract that "requires an employee to waive the employee's right to publicly pursue a cause of action arising under [the Washington State Law Against Discrimination] or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or [that] requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[9] Washington also enacted a law that prohibits an employer from requiring an employee, "as a condition of employment, to sign a nondisclosure agreement . . . that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace."[10] The law "does not prohibit a settlement agreement between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions."

Several other states are actively considering similar laws.[11] Some of these proposals would void provisions that waive an employee's substantive or procedural rights in connection with sexual harassment claims. For instance, the Maryland legislature passed a bill in early April that would void, except as prohibited by federal law, any provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of sexual harassment.[12] Although the law has not yet been signed by the Governor, the bill unanimously passed the Senate, and passed the House by a vote of 136-1. Similarly, in California, the legislature is considering a bill that would prevent employers from requiring employees to arbitrate harassment claims or to waive any right, forum, or procedure available under California's Fair Employment and Housing Act or Labor Code.[13] Other states have considered bills that would prohibit employers from making settlements contingent on an employee signing a

nondisclosure agreement. Some states are considering narrower laws that would void nondisclosure agreements that purport to restrict an employee's ability to discuss criminal conduct. For instance, Arizona recently enacted a law that expressly permits sexual harassment victims to disregard nondisclosure agreements if asked to do so by law enforcement or during a court proceeding.[14] The original bill was broader, and would have voided all nondisclosure agreements covering sexual harassment. ("Whistleblower" carve-outs are often expressly included in confidentiality provisions already pursuant to, among other things, EEOC and SEC provisions and the Defend Trade Secrets Act.)

One key issue to monitor is the extent to which state laws purporting to prohibit arbitration of sexual harassment claims are challenged in court as preempted by the Federal Arbitration Act (FAA). The FAA's "liberal federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), requires the enforcement of arbitration agreements "save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A number of these new state laws seem to expressly contemplate the potential that they are preempted by federal law—the New York provision, for example, does not apply "where inconsistent with federal law." These anticipated preemption challenges may come on the heels of the publication of the U.S. Supreme Court's pending decision on the enforceability of class action waivers in employment agreements.[15]

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Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have about these developments. We have been engaged by numerous clients recently to conduct investigations of #MeToo complaints; to proactively review sexual harassment policies, practices and procedures for the protection of employees and the promotion of a respectful and professional workplace; to conduct training for executives, managers and employees; and to handle related counseling and litigation. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work or the following Labor and Employment practice group leaders:

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[1] S.B. 7507C, 2018 State Leg., Reg. Sess. (N.Y. 2018).

[2] H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

[3] H.B. 2282, 2018 Gen. Assemb., Reg. Sess. (Pa. 2018).

[4] H.B. 5043, 2018 Gen. Assemb., Feb. Sess. (Conn. 2018).

[5] S.B. 132, 2018 Gen. Assemb., Feb Sess. (Conn. 2018).

[6] S.B. 1343, 2018 Leg., Reg. Sess. (Cal. 2018).

[7] A.B. 1867, 2018 Leg., Reg. Sess. (Cal. 2018).

[8] S.B. 7507C, 2018 State Leg., Reg. Sess. (N.Y. 2018).

[9] S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

[10] S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash 2018).

[11] As of the publication of this alert, the following states have considered or are considering similar bills: Arizona, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington. There is also a similar proposal that has been introduced in Congress.

[12] S.B. 1010, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).

[13] A.B. 3080, 2018 Leg., Reg. Sess. (Cal. 2018).

[14] H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).

[15] *Epic Systems Corp. v. Lewis*, No. 16-285 (argued Oct. 2, 2017); *Ernst & Young LLP v. Morris*, No. 16-300 (argued Oct. 2, 2017); *N.L.R.B. v. Murphy Oil USA, Inc.*, No. 16-307 (argued Oct. 2, 2017), all consolidated.