New Legislation on Sexual Harassment Will Significantly Affect the Handling of These Cases for Municipalities

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The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers, including public employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget, signed on April 12, 2018, contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training and settlements of sexual harassment cases immediately ("Legislation").[1] Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City.[2] These pieces of legislation will significantly impact the handling of sexual harassment cases by municipalities.

New York State Legislation

The legislation contained in the New York State budget includes amendments to the New York Executive Law, New York Finance Law, New York Labor Law, New York Civil Practice Law and Rules (CPLR) Law, New York Public Officers Law and New York General Obligations Law relating to the prevention, training and settlement of sexual harassment claims. Significantly, the legislation only applies to "sexual harassment," which is undefined. Earlier versions of the bill contained a definition of sexual harassment, but the definition was left out of the final legislation.

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Significantly, individuals who are not employees are protected in the new legislation. The New York Executive Law has been amended to expand the unlawful discriminatory practice of an employer to include sexual harassment of non-employees in its workplace, including contractor, subcontractor, vendor, consultant or any other person providing services pursuant to contract in the workplace, or someone who is an employee of such contractor, subcontractor, vendor, consultant or other person providing service pursuant to a contract in the workplace.[3] Accordingly, all employers, including public entities, will now also need to expend resources investigating complaints made by non-employees in their work-places and take corrective action to the extent that a non-employee is committing harassment against an employee or an employee is harassing a non-employee, or face liability for failure to do so. Fortunately, the legislation provides that in reviewing cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.[4] Other forms of harassment and harassment based upon protected classes, including, but not limited to, race, age or sex discrimination (that is not sexual harassment) are not covered by this legislation.

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Requirements for State Contractors

The legislation imposes new requirements upon contractors that contract with the "state or any public department or agency thereof" where competitive bidding is required.[5] Effective January 1, 2019, each state contractor shall be required to submit a certification with all bids, under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees.[6] The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law.[7] Any bid that does not meet this requirement will not be considered. It is in the discretion of the state department or agency to require the certification of contracts for services that are not subject to competitive bidding.[8] In

the event the contractor is unable to make the certification, it must provide a signed statement "which sets forth in detail the reasons therefor."[9]

Requirements for All Employers, Including Municipalities

Effective October 9, 2018, all employers, including municipalities, must adopt the model sexual harassment policy promulgated pursuant to the amended Labor Law that equals or exceeds the standards set forth by the New York State Department of Labor, in consultation with the New York State Division of Human Rights.[10] The model sexual harassment prevention policy shall 1) prohibit sexual harassment consistent with the guidance issued by the Department of Labor and provide examples of prohibited conduct that would constitute unlawful sexual harassment; 2) "include but not be limited to, information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws"; 3) "include a standard complaint form"; 4) "include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties"; 5) inform employees of their rights of redress and all available forums for resolving complaints administratively and judicially (this would include notification about the opportunity to file a complaint with the New York State Division of Human Rights and United States Equal Employment Opportunity Commission); 6) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as supervisors and managers that knowingly allow such behavior to continue; and 7) "clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful."[11]

In addition, annual interactive training on sexual harassment must be provided by all employers, including municipalities, effective October 9, 2018.[12] The New York State Department of Labor, in consultation with the New York State Division of Human Rights, shall develop a model training program. The legislation provides that the training shall include 1) "an explanation of sexual harassment consistent with guidance issued by the Department [of Labor] in consultation with the Division of Human Rights"; 2) "examples of conduct that would constitute unlawful sexual harassment"; 3) "information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment"; and 4) "information concerning employees' rights of redress and all available forums for adjudicating complaints."[13] In addition, the annual training must address supervisory responsibilities for the prevention of sexual harassment, and address conduct by supervisors that may constitute sexual harassment.[14] Accordingly, the interactive training provided by municipalities must meet or exceed the requirements of the model training and must be provided to employees and supervisors on an annual basis. "Interactive" is not defined in the legislation so it appears to be an open question whether the training needs to be in-person live training or whether online training that has some interactive features will suffice. It appears that recorded training that has no interactive component may be deemed inadequate. The author recommends "live" training or interactive online training, pending further guidance from the Department of Labor.

Reimbursement by Employee Adjudicated to Have Committed Sexual Harassment

Most municipal lawyers have represented municipalities, officers and employees in claims of sexual harassment for years. The law is well established that municipalities are barred from defending and indemnifying employees for acts committed outside of the scope of their employment, for intentional wrongdoing and recklessness on the part of the employee and for punitive damages. The new legislation requires certain employees of municipalities to pay back the municipality for damages awarded in a sexual harassment case.

New York Public Officers Law § 18 has been amended to add a new section 18-a, effective immediately, which provides for reimbursement to the public entity for an award paid owing to an employee who is adjudicated to have committed harassment. Public entities include, but are not limited to, counties, towns, cities, villages, political subdivisions, school districts, BOCES or other governmental entities or entities operating a public school, college, community college or university, a public improvement or special district, public authorities, commissions, agencies or public benefit corporations and any other separate corporate instrumentality of the state.[15] "Employee" is broadly defined to include "commissioner, member of a public board or commission, trustee, director, officer, employee, or any other person holding a position by election, appointment, or employment in the service of the public entity, whether or not compensated" including a former employee or judicially appointed representative.[16] The new section provides that "any employee who has been subject to a final judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any public entity

that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment."[17] The tortious employee is required to reimburse the public entity within 90 days of the public entity's payment of the award and if the employee fails to do so, the public entity can garnish the employee's wages.[18] There is an additional amendment to New York Public Officers Law which adds section 17-a containing similar legislation applicable to employees of New York State and its agencies.

Fortunately, language that was in the draft bill which appeared to prohibit even the payment of settlements by municipalities, versus final judgments for sexual harassment cases, did not make it into the final legislation. Notwithstanding, there are questions regarding this new provision that may present practical problems for the municipality's lawyer. Does this language create a conflict of interest for the legal counsel between the duty to represent the municipality and defend the employee? For example, even if the municipality's investigation reveals that the employee acted appropriately, there is always a chance that a final judgment could find that the employee was individually liable (for example as an aider or abettor under the Human Rights Law) if the litigation proceeds to a hearing before an administrative agency or trial. Does the fact that the employee may ultimately have to pay a judgment personally create a conflict of interest in both the strategy of proceeding to trial on a case or deciding to settle, as well as in the defense of a claim? These situations are similar to potential conflicts of interest that arise when a plaintiff institutes a case under 42 U.S.C. § 1983 against a municipality and individual employees and seeks punitive damages against individual public employees. There seems to be a question of whether any disclosure to the employee who is accused of harassment as to the possibility of personal financial responsibility is recommended and/or ethically required. If required, should it be in writing? Should there be any waiver of a potential conflict of interest signed by the employee where the attorney is representing both the municipality and the employee? It will be interesting to see whether this new legislation has any impact on the handling of the defense of these cases.

Confidentiality

Non-disclosure or confidentiality agreements are prohibited in sexual harassment claims, except under limited conditions, effective July 11, 2018. New provisions in the New York General Obligations Law and the CPLR prohibit all employers, including municipalities, from utilizing confidentiality agreements in the settlement or resolution of any claim, "the factual foundation for which involves sexual harassment" unless confidentiality is the complainant's preference.[19] Borrowing from the Age Discrimination in Employment Act, the legislation provides that any such term (of confidentiality) must be provided to all parties and the complainant shall have 21 days to consider the provision, and if he or she agrees to confidentiality, it must be stated in a separately executed written agreement subject to revocation by the complainant within seven days after signing it.[20]

The CPLR has also been amended to add a new section under judgements that prohibits non-disclosure or confidentiality agreements as a condition of discontinuing or settling a case "the factual foundation of which involves sexual harassment" unless confidentiality is the plaintiff's preference.[21] The CPLR has also been amended to include provisions identical to those included in the General Obligations Law, including a 21-day consideration period, and seven-day revocation period, as well as the requirement of an additional written agreement evidencing the preference of the plaintiff to keep the matter confidential.[22]

Bar to Mandatory Arbitration Provision in Cases of Sexual Harassment

Finally, effective July 11, 2018, in limited circumstances, the new legislation bars mandatory arbitration provisions in contracts relating to claims of sexual harassment, except where inconsistent with federal law.[23] A new provision has been added to Article 75 of the CPLR that prohibits mandatory arbitration clauses that require that the parties submit to mandatory arbitration to resolve any allegation of claim of an unlawful discriminatory practice or sexual harassment as a condition of the enforcement of the contract or obtaining remedies under the contract.[24] The legislation does state under "exceptions" that "[n]othing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon."[25] Accordingly, under this legislation, mandatory arbitration clauses are not barred altogether other than in cases of sexual harassment. In the event there is any conflict between a collective bargaining agreement and the legislation, the legislation specifies that the collective bargaining agreement shall control.[26]

Stop Sexual Harassment in New York City Act

The New York City Council also passed a package of 11 bills—together referred to as the Stop Sexual Harassment in NYC Act (the "Act"). These bills are being hailed as the nation's farthest reaching anti-sexual

harassment laws. At the beginning of May, Mayor Bill de Blasio signed the bills into law. The respective bills that make up the Act have different implications for different employers. For example, certain employers will be required to conduct an ongoing assessment of risk factors associated with sexual harassment,[27] report annually on workplace sexual harassment,[28] be evaluated through a climate survey of their employees,[29] display anti-sexual harassment posters at their workplace,[30] and conduct annual anti-sexual harassment training for their employees.[31] The respective bills have various effective dates, some of which are effective immediately. While the legislation seems geared toward private employers, the exact impact on municipalities located in New York City should be followed closely.

Conclusion

While there are still some unanswered questions, what is certain is that there will be more legislation and regulations to come. The state legislation expressly directs issuance of guidance and regulations by the New York State Department of Labor, in consultation with the New York State Division of Human Rights. Some of the criticism of the legislation is that it does not go far enough since it does not cover other types of discrimination beyond sexual harassment. Also, while the proposed budget bill contained very detailed requirements for the conduct of investigations, the final bill does not specifically address what needs to be done in order to have a legally compliant investigation. For now, the case law addressing prompt investigations, as well as the EEOC's recommended best practices for investigations, may be the guidepost.[32] It may be assumed that some of the language in the proposed legislation that did not make it into the final bill may find its way into the regulations and guidance.

Employers may be wondering whether other discrimination claims should be treated similarly with respect to the annual training and development of a written policy. It seems that it may be a matter of time before additional legislation is enacted that applies to other forms of discrimination as well. Given that sexual harassment training and policies are often included in an overall harassment and discrimination prevention program that includes all forms of discrimination, it may make sense for municipalities to apply the same investigation and policy requirements to other forms of discrimination and have one policy that covers all forms of harassment and discrimination. In any event, municipal lawyers everywhere in New York State will be busy the next several months implementing the requirements of this new law.

Endnotes

1. 2018 Sess. Laws of N.Y. Ch. 57 (S.7507-C) (McKinney's 2018).
2. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354940&GUID=EE51AA28-8FAA-41FE-B063-BE965FAED119&Options=ID%7CText%7C&Search=Int+657-A.
3. N.Y. Executive Law § 296-d.
4. *Id.*
5. N.Y. State Finance Law § 139-1(1)(a).
6. *Id.*
7. *Id.*
8. *Id.* at § 139-1(1)(b).
9. *Id.* at § 139-1(3).
10. N.Y. Labor Law § 201-g(1)(b).
11. *Id.* at § 201-g(1)(a).
12. *Id.* at § 201-g(2)(a).
13. *Id.*
14. *Id.* at § 201-g(2)(b).
15. N.Y. Public Officers Law § 18-a(1)(a).
16. *Id.* at § 18-a(1)(b).
17. *Id.* at § 18-a(2).
18. *Id.* at § 18-a(3).
19. N.Y. General Obligations Law § 5-336.
20. *Id.*
21. N.Y. Civil Practice Law and Rules § 5003-b.
22. *Id.*
23. *Id.* at § 7515.
24. *Id.*
25. *Id.* at § 7515(4)(b)(ii).
26. *Id.* at § 7515(4)(c).
27. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354916&GUID=DAE201C7-E082-47C8-9C7F-3CA16D20FA7C&Options=ID%7cText%7c&Search=Harassment.
28. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354934&GUID=A8E7F66B-F56A-44E6-8C9C-4FFB28FD518D&Options=ID|Text|&Search=Harassment.
29. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354946&GUID=E08BA5B5-66FB-4528-9207-E8EEA2617D9E&Options=ID|Text|&Search=Harassment.
30. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354924&GUID=CF950C5F-988C-417F-A720-53451ADA064B&Options=ID|Text|&Search=Harassment.
31. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354915&GUID=7A944D7E-BD65-490F-96BE-DCC3CFDBFA46&Options=ID|Text|&Search=Harassment; http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E&Options=ID|Text|&Search=Harassment.
32. EEOC Checklist for Employers, "Checklist Three: A Harassment Reporting System and Investigations," found at https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm.

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