The New NYS Sexual Harassment Laws:
Requirements as of October 9, 2018

By John Dolgetta, Esq.

On April 12, 2018, Governor Andrew Cuomo signed into law the New York State Budget Bill for Fiscal Year 2019 [*see* https://bit.ly/2MgdWC6] (the "2019 Budget Act") which enacts several key legislative initiatives that address sexual harassment in the workplace (hereinafter referred to collectively as the "NYS Sexual Harassment Law"). It is critical for every employer in New York State to be aware of the requirements of these new laws. This article will focus on the elements of the NYS Sexual Harassment Law that go into effect on October 9, 2018, which apply to ***all*** employers regardless of the number of employees employed, and apply to ***all*** employees, paid or unpaid interns, and non-employees, regardless of their immigration status. Therefore, all real estate brokers and brokerage firms also need to comply with the requirements of the new law.

Requirements of the New NYS Sexual Harassment Laws

The 2019 Budget Act added new legislation and also made changes to many of the existing laws such as the New York State Human Rights Law, Executive Law, General Obligations Law, and the Civil Practice Law and Rules ("CPLR"). The new NYS Sexual Harassment Law includes the following:

- It prohibits the inclusion of nondisclosure provisions in any employment or settlement agreements that relate in any way to claims of sexual harassment.
- It prohibits the use of mandatory arbitration provisions in employment or related agreements that relate to claims of sexual harassment.
- Starting on *October 9, 2018*, ***all*** employers must provide a sexual harassment prevention policy to all of its employees (a model form can be found at https://on.ny.gov/2oSFnIY) and must be provided to the employees on an annual basis.
- Starting on *October 9, 2018*, ***all*** employers must provide sexual harassment prevention training on an annual basis to all of its employees in compliance with the sexual harassment prevention training program developed by the New York State Department of Labor ("DOL") and the New York State Division of Human Rights ("NYSDHR" or "Division of Human Rights") (a model sexual harassment prevention training program can be found at https://on.ny.gov/2LuuPII).
- It also expands protection of the employee against sexual harassment under the New York State Human Rights Law by "non-employees", which would make the employer liable for acts of sexual harassment by contractors, subcontractors, vendors, consultants, and other persons providing services pursuant to a contract if the employer is aware of the behavior and does nothing to address it. This would include real estate salespersons and associate brokers who operate under an independent contractor arrangement with a broker or brokerage firm.

The NYS Sexual Harassment Prevention Policy

Starting on October 9, 2018, employers must provide all employees with a sexual harassment prevention policy. The NYS Sexual Harassment Law does not require that the employee acknowledge receipt of the sexual harassment policy in writing, however, it is recommended that employers have each employee do so. New York State has prepared a model policy (the "NYS Model Policy") that can be utilized by employers (*see* https://on.ny.gov/2oSFnIY). In the event an employer elects not to use New York State's model policy, it must ensure that any policy:

- Prohibits sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights.

- Provides examples of prohibited conduct that would constitute unlawful sexual harassment.

- Includes information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws.

- Includes a complaint form [a model complaint form is also available online at https://on.ny.gov/2CEpks6].

- Includes a procedure for the timely and confidential investigation of complaints that ensures due process for all parties.

- Informs employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially.

- Clearly states that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue.

- Clearly states that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

While employers are free to develop their own sexual harassment prevention policy, it would make more sense for smaller employers and businesses to utilize the model form provided by New York State. It can be costly for many businesses to engage legal and other employment professionals to develop a unique policy, and, therefore, the form provided by New York State ensures that an employer is in compliance with the law. However, the NYS Model Form includes the following important disclosure which should be noted: *"Adoption of this policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of*

sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure."

NYS Sexual Harassment Prevention Training

Also starting on October 9, 2018, ***all*** employers must provide sexual harassment prevention training to ***all*** employees (regardless of whether that employee works full-time or part-time, or whether paid or unpaid). New York State has prepared a model sexual harassment training program (the "NYS Model Training Program") that can also be utilized by employers (*see* https://on.ny.gov/2LuuPII). Again, while it is not required that employers use the NYS Model Training Program, it is recommended that they do so. In the event, however, an employer elects not to utilize and implement the NYS Model Training Program, New York State requires that any training program *must* include the following:

> "Every employer in the State of New York is required to provide employees with sexual harassment prevention training pursuant to Section 201-g of the Labor Law. An employer that does not use the model training developed by the State Department of Labor and Division of Human Rights must ensure that the training that they use meets or exceeds the following minimum standards. The training program must:
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> (i) be interactive;
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> (ii) include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
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> (iii) include examples of conduct that would constitute unlawful sexual harassment;
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> (iv) include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
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> (v) include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
>
> (vi) include information addressing conduct by supervisors and any additional responsibilities for such supervisors.
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> Each employee must receive training on an annual basis, starting October 9, 2018. Employers should provide employees with training **in the language that is spoken by their employees** [emphasis added]."

While many of the required elements above are straightforward, the initial implementing legislation did not provide for a specific description or definition of the term "interactive". The NYS Model Training Program developed by New York State does, however, provide critical guidance as to what constitutes "interactive" and explains that "…it requires some level of participation by those being trained." It goes on to state that "[t]he training should include as many of the following elements as possible:

- Be web-based, with questions asked of employees as part of the program.
- Accommodate questions asked by employees.
- Include a live trainer made available during the session to answer questions.
- Require feedback from employees about the training and the materials presented."

Non-Disclosure Provisions are Restricted for Sexual Harassment Claims

In light of the restrictive clauses that were contained in the agreements relating to the sexual harassment claims brought against Harvey Weinstein and others, the 2019 Budget Act amended provisions of the New York General Obligations Law and CPLR. As of July 11, 2018, all employers are prohibited from including such nondisclosure provisions in any documents involving sexual harassment, unless the complainant desires that such provisions be included.

Section 5003-b of the CPLR provides that when there is a resolution or settlement of "…any claim or cause of action" involving sexual harassment "…no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference." If there is such a provision included, it "…must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties." The plaintiff then also has an additional seven (7) days to revoke any such settlement agreement and if such revocation does not take place then the agreement will become effective. A similar provision was also added to Section 5-336 of the General Obligations Law.

Mandatory Arbitration Provisions Relating to the Resolution of Sexual Harassment Claims Are Banned!

The new law also bans the use of "mandatory arbitration clause" in connection with any resolution of a sexual harassment claim. The FAQs [*see* https://on.ny.gov/2MdjJII] provided by New York State explain that "[a] mandatory arbitration clause is a requirement in any written contract that: (1) when faced with contract disputes, compels parties to seek arbitration before going to court and (2) makes facts found at arbitration final and not subject to review by the courts." Specifically, Section 7515 of the CPLR prohibits the use of such clauses in any

employment or other agreement that would compel the parties to use mandatory arbitration as a dispute resolution mechanism. This prohibition applies to ***all*** employers.

Section 7515(a)(2) defines a "prohibited clause" as "…any clause or provision in any contract 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." This ban on a "mandatory arbitration" clause only relates to sexual harassment claims. Parties are still free to include such provisions in agreements for other issues that do not involve sexual harassment and are not otherwise prohibited by any other law. Further, if such a clause were erroneously added into an agreement it would not serve to invalidate the entire agreement.

An Employer Is Liable for Actions of Non-Employees!

The 2019 Budget Act also modified the New York State Human Rights Law to extend liability to employers who "permit" sexual harassment of "non-employees" in their workplace effective as of April 12, 2018. The FAQs explain that "…an employer may be held liable for the sexual harassment of a non-employee who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace." These include "…independent contractors, 'gig' workers, and temporary workers[,]…persons providing equipment repair, cleaning services, or any other services provided pursuant to a contract with the employer." This would certainly include real estate brokerage firms.

An employer is required to provide a workplace that is free from sexual harassment and where an "…employer, its agents or supervisors *knew* or *should have known* [emphasis added] about the harassment and failed to take 'immediate and appropriate corrective action,'" liability will accrue. If a person has been the victim of sexual harassment, that person should inform the employer or a supervisor immediately, if he or she feels comfortable doing so, in accordance with the mandated sexual harassment policy. However, a victim may also contact the appropriate local, state and federal agencies, including the local police department, if the harassment involves physical touching, coerced physical confinement or coerced sexual acts.

Complaints with the NYSDHR may be filed at any time within one (1) year of the harassment. If an individual does not file a complaint with NYSDHR, there is a three (3) year statute of limitations, which runs from the date of the sexual harassment incident, for lawsuits filed in court. In addition to reaching out to the DHR, an individual may also reach out to the Equal Employment Opportunity Commission (www.eeoc.gov) or, if the person is employed in NYC, to the New York City Commission on Human Rights, Law Enforcement Bureau (www.nyc.gov/html/cchr/html/home/home.shtml). Employers must strictly adhere to the requirements of these new laws or they will be subject to major liability and exposed to substantial damages.

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