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New York State Issues Additional Guidance Following Recent Expansion of Workplace Anti-Discrimination Protections

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As we previously reported, on August 12, 2019, New York State Governor Andrew Cuomo signed into law significant legislation to expand workplace anti-discrimination protections. The State has now updated its FAQs to provide additional guidance on these new requirements. There are several key points now included in the guidance that provide some clarity on employers' notice, policy and training responsibilities.

Under the recently amended law, New York employers are required to provide employees, both at the time of hire and at every annual sexual harassment prevention training, with a notice containing the employer's sexual harassment prevention policy and "the information presented at the employer's training program." Employers must provide the notice, policy and training materials in writing in English and in the language identified by an employee as their primary language, if different.

As part of the new guidance, the State has now published a template Sexual Harassment Prevention Notice, which must be provided to employees in addition to the employer's anti-harassment policy and training materials. The notice may be distributed digitally or in print, and employers must either attach their complete policy (including the required complaint form) and training materials or provide a link to such materials. Employers must also designate a person or office to whom individuals can go to with questions or file a complaint, and provide appropriate contact information.

With respect to the training materials that must be distributed, the updated FAQs clarify that this includes “any printed materials, scripts, Q+As, outlines, handouts, PowerPoint slides, etc.” If an employer uses the State’s model materials, or other training materials that are delivered through software or video, a link to such materials would be sufficient. In other instances, employers and training providers should make “reasonable efforts” to provide the information (e.g., providing print-outs or links to training materials, scripts or PowerPoint slides).

The updated FAQs state that for new employees, employers should provide the notice, policy and training materials prior to or at the beginning of their first day of work. The guidance also states that employers must provide these materials in both English and in an employee’s primary language if it is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali or Italian; the State has published model materials online that may be used to satisfy this requirement. While the guidance appears to only require that these materials be provided in the above-mentioned languages (as applicable), it also states that because employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a policy and training in the language spoken by the employee (even if not one of the languages listed above).

As a reminder, the new law also now bars nondisclosure provisions in any settlement, agreement or other resolution of any claim, the factual foundation of which involves discrimination on the basis of any protected class, unless the condition of confidentiality is the preference of the complainant. In order to be deemed the “preference of the complainant,” any term or condition regarding nondisclosure must be provided in writing to all parties “in plain English” and, if applicable, the primary language of the complainant. In addition, the existing prohibition on mandatory pre-suit arbitration of sexual harassment claims has been extended to any claims of unlawful discrimination. However, as is the case with the prohibition on mandatory arbitration of sexual harassment claims, the expanded prohibition applies only to the extent it is not inconsistent with federal law and recently, the Southern District of New York held in Latif v. Morgan Stanley Co. (S.D.N.Y. June 26, 2019), that the prohibition on mandatory arbitration of sexual harassment claims is, in fact, preempted by the Federal Arbitration Act in situations where both laws apply. The new FAQs do not provide any further insight.

We will continue to report on any further developments with regard to this law.

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