LAMB&BARNOSKY,LLP

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MEMORANDUM

TO: **OUR EMPLOYER CLIENTS**

FROM: **LAMB & BARNOSKY, LLP**

DATE: **MAY 7, 2018**

RE: **NEW STATE LAWS REQUIRING ALL EMPLOYERS TO TAKE STEPS TO ADDRESS AND PREVENT SEXUAL HARASSMENT**

KEEPING YOU INFORMED...

The 2018-2019 New York State Budget Bill, signed by Governor Cuomo on April 12, 2018, enacted several laws mandating that all public and private employers address workplace sexual harassment through the implementation of a variety of measures. Employers will need to revise their policies, training programs and contracts with third parties who enter their workplace as a result of these new laws. The new requirements are summarized below.

All Employers Must Adopt a Sexual Harassment Prevention Policy

- All employers are required to adopt and distribute to all employees, in writing, a sexual harassment policy. This must be done by no later than October 9, 2018. Any time a new employee is hired, the employee must also be given this policy.

  An employer may either adopt the model sexual harassment prevention policy that is being created by the New York State Department of Labor (DOL) and the New York State Division of Human Rights (DHR) or its own policy. If an employer adopts its own policy, the policy must equal or exceed the minimum standards in the model policy. The policy must:

  (1) prohibit sexual harassment and provide examples of prohibited conduct that would constitute unlawful sexual harassment;

  (2) include information regarding federal and state laws concerning sexual harassment, remedies available to victims of sexual harassment, and include a statement that local laws may be applicable;

  (3) include a standard complaint form;

(4) include a procedure for timely and confidential investigation of complaints and ensure due process for all parties;

(5) inform employees of their right to redress claims administratively or judicially;

(6) state that sexual harassment is considered a form of employee misconduct and that sanctions will be entered against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow the behavior to continue; and

(7) state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding is unlawful.

- To date, the model policy and standard complaint form have not been released. Nor has the Commissioner of Labor indicated whether implementing regulations will be issued.

All Employers Must Implement a Sexual Harassment Prevention Training Program

- Commencing October 9, 2018, all employers are required to provide sexual harassment prevention training, at least annually, to all employees. An employer must either utilize the model sexual harassment prevention training program being developed by the DOL and SDHR, or one that it establishes on its own as long as the program equals or exceeds the minimum standards provided by the model program. The model program is to be interactive and include:

  (1) an explanation of sexual harassment;

  (2) examples of conduct that constitute unlawful sexual harassment;

  (3) information regarding federal and state laws 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.

- It is not yet clear whether employers will have a year from October 9, 2018 to conduct this training since the model training program has not been released. Nor has the Commissioner of Labor indicated whether implementing regulations will be issued.

Sexual Harassment of Non-Employees in the Workplace is Prohibited

- Immediately upon the April 12, 2018 enactment of the Budget Bill, a new unlawful discriminatory practice was added to the New York State Executive Law (commonly referred to as the Human Rights Law), whereby an employer will be found to have

engaged in an unlawful discriminatory practice if it permits sexual harassment of non-employees in its workplace.

- Non-employees include a contractor, subcontractor, vendor, consultant, or other person, or their employees, providing services to the employer pursuant to a contract.

- An employer may now be held liable to a non-employee if the employer, its agents or supervisors knew or should have known that the non-employee was subjected to sexual harassment in the employer's workplace and failed to take immediate and appropriate corrective action.

- We recommend that contracts entered into with non-employees who will be entering your workplace be revised to include provisions addressing how you will address concerns about sexual harassment and requiring the contractor to advise its employees of same.

Contract Clauses Mandating Arbitration of Sexual Harassment Claims are Prohibited

- Commencing July 11, 2018, all employers with four or more employees are prohibited from including any clause in a contract, which requires as a condition of the enforcement of the contract or for obtaining remedies pursuant to the contract, that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment. Any contract entered into on or after July 11, 2018 containing a mandatory arbitration clause will remain enforceable, but the prohibited clause will be null and void. We therefore recommend that any contracts with mandatory arbitration provisions be updated prior to July 11, 2018. If there is a conflict between a collective bargaining agreement provision and the new law, the collective bargaining agreement will control.

Nondisclosure Agreements Prohibited

- Commencing July 11, 2018, nondisclosure clauses prohibiting disclosure of the underlying facts and circumstances to a sexual harassment claim or action in settlements or other agreements or resolutions are not permitted unless the condition of confidentiality is the complainant's preference. If included as the complainant's preference, he/she must be provided with 21 days to consider the term or condition relating to nondisclosure and then must be given at least seven days after execution of the agreement to revoke it.

Additional Requirements Applicable to Public Employers

Required Statement for Public Bidding

- Commencing January 1, 2019, every competitively required bid submitted to the State or any department or agency of the State must contain an affirmation certifying that the bidder: (1) has implemented a written policy addressing sexual harassment prevention in the workplace, and (2) provides annual sexual harassment prevention training to all of its employees.

- When a competitive bid is not required, the department, agency or official still has the discretion to require the certification.

Reimbursement of Funds by Public Employees Found Liable for Intentional Wrong-doing

- Effective April 12, 2018, public employees subject to a final judgment of personal liability for intentional wrong-doing related to a claim of sexual harassment are required to reimburse the public employer or the entity that makes payment for their proportionate share of the judgment. This reimbursement must occur within 90 days of payment.

- For purposes of this provision, the term public entity includes a county, city, town, village or other State political subdivision or civil division; a school district, BOCES, or any other governmental entity or combination or association of governmental entities operating a public school, college, community college or university; a public improvement or special district; a public authority, commission, agency or public benefit corporation; or any other separate corporate instrumentality or unit of government.

If you would like assistance creating, revising, updating, implementing or providing sexual harassment prevention training or policies, or updating contracts with third parties to address these new requirements, please contact Sharon N. Berlin, Esq. or one of our other attorneys at (631) 694-2300.