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Anti-Harassment Compliance Tips For Construction Industry Employers

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The #MeToo movement has prompted employers to reassess their efforts to ensure a safe and supportive workplace for employees. As the movement has gained momentum, government authorities and private plaintiffs have increasingly pursued workplace misconduct investigations and claims, and city and state legislatures—including in New York—have passed new anti-sexual harassment laws requiring companies to take meaningful steps to ensure compliance. Although this new legal environment affects all New York businesses, it warrants particular attention from employers within the construction industry. Indeed, under certain anti-sexual harassment laws, employer liability extends beyond the actions of employees to the actions of anyone providing services at a location—including all contractors, subcontractors, vendors, and consultants working at a jobsite.

Recent studies show that sexual harassment is a particular concern in the construction industry. According to one study, about one in three women working in construction report that sexual harassment is "a constant or frequent experience at work." Another study found that two-thirds of architects have experienced sexual harassment on a jobsite, including 85% of female respondents.

This article highlights recent litigation and enforcement actions, both private and public, as well as new legal requirements in states, including New York, which serves as a case study in the developing compliance landscape around the country. This article also makes recommendations for employers in the construction industry to ensure that they have strong anti-

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harassment compliance programs that promote safe and inclusive working environments.

Private Litigation

Companies that fail to address harassment in the workplace—particularly the construction sector in some of its most active geographies—face a significant litigation risk, especially in light of recent changes to the legal landscape. For example, private litigants in New York City have a lower burden of proof to establish a hostile work environment. Whereas both New York state law and federal law currently require a "severe and pervasive" pattern of practice (see *Hernandez v. Kaisman*, 103 A.D.3d 106, 113 (N.Y. App. Div. 2012); *Sauerhaft v. Bd. of Educ. of Hastings-on-Hudson Union Free Sch. Dist.*, 2009 WL 1576467, at *4 (S.D.N.Y. June 2, 2009)) the standard in New York City is whether a plaintiff has been treated "less well" than his or her co-workers (see *William v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 36 (App. Div. 2009); N.Y.C. Admin. Code §8-130). Just recently, in June 2019, New York lawmakers passed a bill that would align the state with the City in rejecting the "severe and pervasive" standard; this bill is awaiting signature by the governor. California similarly implemented a lower standard for proving sexual harassment claims earlier this year.

For construction companies operating in New York, the civil docket is active. In April 2019, for example, a woman who had worked on construction sites at some of Manhattan's premiere residential addresses brought a suit against her employer, Tradeoff Construction Services, alleging physical abuse and repeated sexual harassment. Tradeoff Construction had previously faced allegations of sexual harassment by employees in connection with its recent work at Hudson Yards. In their complaint, those employees also named as defendants the Related Companies and Gilbane—in their capacities as developers and contractors—for failing to "prevent or remedy" sexual harassment at the Hudson Yards jobsite.

The New Enforcement and Legislative Landscape in New York

New York—one of the world's largest and most prominent construction and development hubs—provides an important case study in how the enforcement and legislative response to the #MeToo movement is developing in state and municipal governments.

Uptick in Public Enforcement. Over the past year, the New York Attorney General (NYAG) and New York State Comptroller (Comptroller) have joined private plaintiffs in initiating high-profile cases rooted in claims of sexual harassment. Based on its power under New York Executive Law §63(1) to bring actions against those who "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business," the NYAG has pursued cases against The Weinstein Company (TWC), Viacom, and The Spotted Pig. In February 2018, the NYAG filed a complaint in New York state court seeking injunctive and equitable relief against TWC and halted the company's sale. Revelations from the NYAG's investigation into sexual harassment at Viacom also led to a private securities class action.

The Comptroller, in his position as a large shareholder of New York's pension funds, has also increasingly focused on sexual harassment. Most notably, he is currently a named lead plaintiff in a shareholder suit against Wynn Resorts, claiming breach of fiduciary duty based on the board of directors' failure to act in the face of numerous allegations of sexual harassment by the company's former Chairman and CEO, Stephen Wynn.

State Legislation. Over the past two years, the state of New York has taken significant legislative steps to combat sexual harassment. On April 12, 2018, Governor Cuomo signed into the law the 2019 New York State Budget, which included a sweeping modernization of the state's anti-sexual harassment laws. And on June 19, state lawmakers passed Senate Bill 6577, which Governor Cuomo is expected to sign, that again tackles sexual harassment head on.

Ban on Mandatory Arbitration Clauses and Non-Disclosure Agreements. Under the changes set forth in the April 2018 law, no employment contract can require parties to submit to mandatory arbitration prior to any legal process to resolve any claim of sexual harassment. See New York Civil Practice Law and Rules §7515. With the exception of clauses in collective bargaining agreements, all such clauses—including those predating the new law—are null and void. The fate of this provision is unclear, however, as a federal

district court ruled in Latif v. Morgan Stanley & Co., 2019 WL 2610985, No. 18-CV-11528 (S.D.N.Y. June 26, 2019), that the provision was preempted by the Federal Arbitration Act.

New York General Obligations Law §5-336, as enacted in April 2018, also now prohibits employers from including in a settlement, or otherwise agreeing to, a non-disclosure agreement regarding a claim based on allegations of sexual harassment. If the complainant wishes to include a confidentiality clause, notice must be given to all parties and the complainant may revoke the confidentiality request at any point over the following 21 days. After 21 days, the confidentiality clause can be memorialized. The complainant can revoke the executed agreement for seven days after memorialization, and the agreement is not effective or enforceable until that period expires. In addition, the legislation passed in June 2019, once signed by the governor, promises to void any confidentiality clause that restricts the complainant's participation in law enforcement investigations or the complainant's ability to disclose facts necessary to receiving public benefits.

New York's neighboring states are making similar legislative moves. In March of this year, New Jersey adopted a law rendering unenforceable in employment contracts mandatory arbitration provisions relating to harassment or discrimination. The law also prohibits non-disclosure agreements pertaining to harassment and discrimination settlements. Likewise, the Connecticut legislature is currently considering a bill banning non-disclosure agreements in the context of sexual harassment and sexual assault cases. And the federal government is acting as well: The Tax Cuts and Jobs Act of 2017 ended employers' ability to deduct as business expenses settlement payments where a settlement relates to a sexual harassment or abuse claim and is subject to a non-disclosure agreement.

Expanded Scope of the Human Rights Law. New York's Human Rights Law §296-d traditionally only applied to employees. Following amendments in April 2018, the law now applies to non-employees such as contractors, subcontractors, vendors, consultants or anyone providing services in the workplace, including independent "gig" workers, and temporary workers. The law also extends to cleaners and those repairing equipment. Thus, under §296-d, an employer may be liable for sexual harassment of a non-employee if the employer knew (or should have known) about the harassment but did not take

A number of defense organizations have opposed the law on the ground that it violates a defendant's right to due process by preventing an individual from raising a defense at trial or for purposes of plea bargaining.

Requirements for Company Policies and Training. Under New York Labor Law §201-g, as amended in April 2018, every employer in New York State is now required to provide interactive (i.e., no videos or giving employees a document to read) sexual harassment prevention training, which must meet a set of minimum standards. Training must be given to all employees by October 9, 2019 and must continue on an annual basis. Training is required for all workers, including part-time, seasonal, and temporary workers, and applies to any employee who works "a portion of their time in New York State." Further, employers must also either adopt New York's model sexual prevention harassment policy, or craft their own policy that meets or exceeds eight minimum standards. Under the June 2019 legislation, once enacted, employers will be required to provide the sexual harassment prevention policy to their employees, in English and in each employee's primary language, upon hiring and at every annual sexual harassment prevention training.

City Legislation. New York City, for its part, has adopted its own set of sexual harassment laws as part of the Stop Sexual Harassment in NYC Act, signed by Mayor de Blasio in May 2018. The City law expands the NYC Human Rights Law—which previously applied only to employers with at least four or more employees—to apply to all employers, regardless of its size, with respect to gender and sexual harassment claims. It also extends the statute of limitations for sexual harassment claims from one to three years from the time of the alleged harassment. N.Y.C. Law 2018/100. The City law further imposes extra training requirements in addition to those under state law, effective April 1, 2019. N.Y.C. Law 2018/96. Violators of the law can face civil penalties of up to $250,000, and the

NYC Commission on Human Rights can also assess emotional distress damages and other remedies without limit. See N.Y.C. Human Rights Law §8-402 et seq.

Recommendations

As described above, states and municipalities, including New York, are increasingly focused on combatting workplace sexual harassment through litigation, enforcement measures, and legislation. Employers must, at a minimum, ensure that they are in compliance with the laws of the various overlapping jurisdictions in which they operate. But creating and maintaining a healthy workplace culture requires more than mere compliance. Companies that are serious about preventing and appropriately responding to complaints of sexual harassment and fostering an equitable and inclusive environment must conduct a clear-eyed assessment and ask tough questions:

Are there weaknesses in the corporate culture? Does senior management set the appropriate "tone at the top" such that the company's core values are effectively communicated throughout the chain? What is the composition of the board of directors, the executive committee, and senior management, and what message does that composition send to employees?

What reporting mechanisms are available? What routes are available to employees to report sexual misconduct? How are those mechanisms communicated to employees?

How does the company track and elevate complaints? Are sexual harassment complaints tracked? When and how are such complaints or issues elevated, and to whom? Is the board, or a subcommittee thereof, notified of high-risk complaints (e.g., complaints involving senior leadership)?

What are the company's investigation practices and procedures? Does the company have thorough investigative procedures that govern how complaints are investigated and resolved? Are those procedures fair? Are the employees responsible for investigating complaints following these procedures consistently, being trained properly, and keeping accurate records?

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How are promotions and compensation tracked? Does the company conduct regular audits to identify potential issues and analyze data for disparities, including pay equity?

Are the company's policies best-in-class? Has the company reviewed written policies related to workplace behavior, including policies addressing harassment, relationships, travel, hiring, promotions, and investigations of alleged misconduct, to ensure that such policies are in compliance with the laws of the relevant jurisdiction? Are refinements necessary to make those policies best-in-class? How are policies communicated to employees such that all employees know the "ground rules"?

How does the company handle third parties? Does the company conduct due diligence for sexual harassment and non-discrimination policies of third-party vendors? Is there regular reporting and inspection of jobsites and other locations where the company may be liable for the actions of third parties?

Are sexual misconduct claims subject to mandatory arbitration and/or nondisclosure agreements? Are those agreements still enforceable in the relevant jurisdictions?

Sexual misconduct in the workplace has significant consequences for performance, recruiting, morale, and a company's bottom line. As states and cities continue to update their laws, the construction industry must pay close attention to the evolving compliance landscape and focus on any necessary improvements to their internal culture, policies, and practice.