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Growing State Anti-Discrimination and Anti-Harassment Protections Create Patchwork of Regulations for Employers

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The #MeToo Movement, now in its third year, continued its evolution from grassroots activism to legislative change in 2019, with new laws addressing discrimination and harassment emerging from state governments and resulting in significant protections for employees. Employers face a patchwork of rules as they balance compliance with various state laws while also maintaining consistency in their workplace policies, procedures and trainings. Significant legislation in California, Illinois, New York state and New York City alone will affect tens of millions of employees, and employers can expect more states to follow the lead of these jurisdictions in the months and years to come.

Meanwhile, at the federal level, the trend of deregulation and lack of action continued. Long-awaited enforcement guidance on unlawful harassment from the Equal Employment Opportunity Commission (EEOC) remains in limbo, awaiting approval by the Office of Management and Budget, after first being proposed in January 2017. Additionally, the EEOC announced in September 2019 that it will stop collecting wage data for years after 2018. That move came after wage data collection requirements — which are meant to reduce pay inequality — were reinstated by the courts for 2017 and 2018.

Confidentiality Limits for Settlements and Employment Agreements

In California, newly enacted Section 1001 of the Code of Civil Procedure invalidates any provision in a settlement agreement that prevents an employee from disclosing the facts underlying a charge or complaint of workplace sexual harassment or sex discrimination. The law applies to any settlement on or after January 1, 2019. Additionally, Section 12964.5 of the California Government Code forbids employers from requiring their employees to sign a release of claims or a nondisclosure agreement related to sexual harassment or other illegal conduct as a condition of employment.

In Illinois, the Workplace Transparency Act, effective January 1, 2020, applies to certain settlements and employment agreements entered into or modified on or after that date. The Act drastically limits an employer's ability to require a provision in a settlement or termination agreement that prohibits an employee or former employee from making truthful statements of fact regarding unlawful workplace conduct. This type of confidentiality clause may be included only if it is the employee's stated preference, and an employer must give consideration in exchange for confidentiality. The Workplace Transparency Act also forbids any employment agreement or waiver that prevents an employee from disclosing illegal workplace conduct, including sexual harassment, to government authorities.

In June 2019, the New York State Legislature expanded its prohibition on confidentiality provisions in settlements. Agreements that resolve discrimination complaints may only prevent an employee from disclosing the facts and circumstances underlying the complaint if such nondisclosure is the employee's preference. This confidentiality prohibition previously applied only to settlements related to sexual harassment. Similar to Illinois law, a confidentiality provision may be included if it is the employee's preference. Additionally, any employment

agreements "that prevent the disclosure of factual information related to any future claim of discrimination" are unenforceable unless the agreements notify employees that they may discuss claims with government authorities and their own attorneys.

Mandatory Anti-Harassment Training

A new anti-harassment training mandate in California applies to employers with five or more employees, down from a 50-employee threshold prior to 2019. Where training was required only for supervisors, now all employees must receive anti-harassment training by January 1, 2021, and every two years thereafter. The statute specifies the required content and process for administration, for instance, the training must be interactive and must include instruction on bystander intervention.

Illinois' anti-sexual harassment training mandate applies to all entities, regardless of size, with employees in the state. Employees in Illinois must receive training annually starting January 1, 2020. Additional, industry-specific trainings must be provided to restaurant and bar employees. Penalties for noncompliant employers start at $500 for a first offense, rising to $3,000 for a third or subsequent offense.

New York employers faced their first anti-harassment training mandate deadline on October 9, 2019. All employees working in New York state for any portion of their employment must receive annual, interactive anti-harassment training. Additionally, New York City employers with 15 or more employees must administer annual anti-harassment training with more comprehensive content than the state-required training — though an employee who receives city-mandated training also will satisfy the state requirement.

Lower Standards of Proof Under Anti-Harassment and Anti-Discrimination Laws

Under federal anti-discrimination laws, a plaintiff alleging sexual harassment must prove that the harassing conduct was so severe or pervasive as to create an abusive, hostile or intimidating workplace. Until October 2019, the severe and pervasive standard also applied to sexual harassment suits brought under the New York State Human Rights Law. Now, to succeed on such a claim, a plaintiff need only prove the harassment caused inferior terms, conditions or privileges of employment. The new legislation also provides that the New York Human Rights Law must be construed liberally regardless of the manner in which similar federal civil rights laws are interpreted. The changes bring the state Human Rights Law in line with the New York City Human Rights Law, which has had a lower standard of proof since the 2009 state court ruling in *Williams v. New York City Housing Authority*.

Restrictions on Predispute Arbitration

California, Illinois and New York recently enacted laws aimed at curtailing mandatory arbitration for employment disputes. Under new revisions to California's Government and Labor Codes and under the Illinois Workplace Transparency Act, in both states an employer may not require an employee to sign an arbitration agreement as a condition of employment after January 1, 2020. In a June 2019 decision in *Latif v. Morgan Stanley & Co. LLC*, the United States District Court for the Southern District of New York struck down a New York state law that purported to invalidate mandatory arbitration agreements for discrimination claims, holding that the law is inconsistent with the Federal Arbitration Act. Similarly, a temporary restraining order preventing the California arbitration limits from going into effect was issued on December 29, 2019, by the United States District Court for the Eastern District of California in *Chamber of Commerce of the U.S. v. Becerra*.

The 2020 Landscape

Under the Federal Arbitration Act, state limits on arbitration are likely preempted. However, the wide variety of other state reforms enacted recently are probably here to stay and will very likely be emulated in other jurisdictions — albeit with some differences. Employers also must account for other stakeholders — such as applicants, employees, shareholders and customers — who will press for policies more comprehensive than what state or federal laws require. For instance, students at top law schools, including Harvard Law School, recently targeted law firms that have mandatory arbitration agreements for their employees, prompting a number of firms to drop those agreements. Similarly, several Silicon Valley entities have done away with mandatory arbitration for discrimination claims as a result of pressure from employees and activists. These examples demonstrate that employers must stay informed of current trends and demands for reform, even where their practices are lawful.

Following the lead of California, Illinois and New York, new laws in Nevada, New Jersey, Oregon and Vermont now restrict the use of confidentiality provisions in sexual harassment and discrimination settlements. Likewise, nondisclosure agreements that limit an employee's right to report allegations of discrimination and sexual harassment recently have been prohibited in New Jersey, Oregon, Vermont and Washington. In addition, the legislatures in New Jersey, Vermont and Washington recently have enacted bills limiting the use of arbitration to resolve charges of workplace harassment

and discrimination. In the coming year, employers can reasonably expect that additional states may enact legislation in this area.

Employers should prepare for increasingly fragmented state-by-state regulation, with each new law imposing unique requirements, by:

- reviewing employment agreements, separation agreements and settlements for compliance with the new laws;
- drafting a confidentiality provision in light of applicable state and federal laws, in particular by allowing parties to make factual disclosures to authorities;
- instituting thorough and comprehensive anti-harassment training for all employees;
- monitoring deadlines for required trainings and providing those trainings early in the employment relationship — preferably as part of the onboarding process;
- educating employees about workplace conduct in light of new legal standards applicable in harassment cases;
- reviewing and rewriting anti-harassment policies to be consistent with laws, new trainings and best practices;
- examining legislative and regulatory developments in other states, even where an employer does not currently operate; and
- supporting diversity and inclusion initiatives for employees.