Employer Update

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Legislating #MeToo: Turning a Hashtag into Law

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In response to the #MeToo media explosion which emanated in large part from the Harvey Weinstein revelations in October 2017, state and local legislatures across the country have proposed and enacted well over one hundred pieces of legislation to combat sexual harassment. Among the most robust of this new wave of legislation are bills that have been enacted in New York State and New York City. In April 2018, Governor Andrew Cuomo and Mayor Bill de Blasio broadened the state and city laws regulating sexual harassment in the workplace[1] by signing the 2018 – 2019 New York State Budget and the New York City Stop Sexual Harassment Act, respectively.

The new state law focuses on combating the silencing of sexual harassment in the workplace by prohibiting employers from requiring employees to sign non-disclosure and mandatory arbitration agreements relating to claims of sexual harassment. The state law also expands employer liability to cover sexual harassment experienced by third parties who render services to a business. Additionally, under both the state and city laws, employers must now provide annual, interactive anti-sexual harassment training to all supervisors and employees.

What Constitutes Sexual Harassment?

To contextualize the recent New York State and New York City legislation, it is useful to review briefly the law of sexual harassment.

Title VII does not define the term "sexual harassment." The Supreme Court, however, has referred to the Equal Employment Opportunity Commission (EEOC) Guidelines in interpreting what constitutes sexual harassment under Title VII. In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986), the Supreme Court noted that the EEOC Guidelines, 29 C.F.R. § 1604.11(a), define sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that are explicitly or implicitly made a condition of an individual's employment, used as a basis for employment decisions affecting the individual, or have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The Supreme Court has also interpreted Title VII to prohibit sexual harassment as an unlawful form of gender discrimination that can occur in two ways. *Quid pro quo* harassment occurs when an employer conditions an employment decision on an employee's fulfillment of a sexual demand, and hostile work environment harassment occurs when "severe or

pervasive" conduct "create[s] an abusive working environment" so as to alter conditions of employment. *See Meritor*, 477 U.S. 57, 64–67.

Similarly, the New York State Human Rights Law (NYSHRL) also does not provide a definition of sexual harassment. Nonetheless, New York courts follow Title VII in determining whether sexual harassment has occurred under the NYSHRL; thus, sexual harassment claims are typically evaluated similarly under Title VII and the NYSHRL. *Perks v. Town of Huntington*, 251 F.Supp.2d 1143, 1158 (E.D.N.Y. 2003) (*citing Sowemimo v. D.A.O.R. Security, Inc.,* 43 F.Supp.2d 477, 484 (S.D.N.Y. 1999)).

The New York City Human Rights Law (NYCHRL), however, diverges from its federal and state counterparts in its construction and application of workplace sexual harassment. In *Williams v. New York City Hous. Auth*., 872 N.Y.S.2d 27, 36 (2009), the court concluded that the legislative history of the law clearly indicates that the City Council "wanted the local law's provisions to be construed as *more remedial than federal civil rights law and the State HRL* (Administrative Code § 8–130, as amended by the Restoration Act in 2005)" (emphasis in original). Significantly, unlike the Title VII and the NYSHRL, sexual harassment under the NYCHRL need not be of a sexual nature. *Id.* Rather, the NYCHRL holds employers liable for sexual harassment when an employee demonstrates merely that [s]he "has been treated less well than other employees because of [his or] her gender." *Id.*

The absence of a clear definition of "sexual harassment" opens the door for ambiguity regarding the applicable scope of the new state prohibitions on nondisclosure clauses and mandatory arbitration agreements for sexual harassment claims. Indeed, some advocates have criticized Governor Cuomo's new legislation for failing to define sexual harassment, contending that the omission will lead to narrow interpretations of the law's protections.[2] In defense of the new law's lack of a definition of "sexual harassment," legislators have asserted the need for a flexible definition of that term in order to adapt to changing public understandings of acceptable behavior, particularly in light of the #MeToo movement.[3]

Current Standards of Employer Liability for Sexual Harassment

Under the federal, state, and city laws, employers can be liable for sexual harassment carried out *by* employees, as well as sexual harassment *of* employees. The new state legislation expands the scope of an employer's liability for sexual harassment *of* non-employees, but it does not change the standard of employer liability *by* non-employees.

Under existing state law, employers are liable for sexual harassment committed *against* employees by *non-employees*, such as customers, clients, or independent contractors, if the employer "became a party to [the conduct] by encouraging, condoning, or approving it." *New York State Div. of Human Rights v. ABS Elecs., Inc.*, 958 N.Y.S.2d 502, 504 (N.Y. App. Div. 2013).[4] Courts in the Second Circuit analyze state law claims of sexual harassment by non-employees by considering whether the employer "kn[ew] or should have known of the conduct and fail[ed] to take immediate and appropriate corrective action." *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (citing 29 C.F.R. § 1601.11(e)). In construing the NYSHRL, courts will examine "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Id*.

The NYCHRL, however, imposes a broader scope of duty on the employer to take corrective action in response to harassing behavior by a non-employee in the workplace. Under the NYCHRL, when the employer is on notice of such harassment, the employer must take proactive steps to prevent future harassment. Mere reactive action, such as ejecting a harassing customer from a store, may not constitute sufficient remedial action required by the NYCHRL. *Swiderski v. Urban Outfitters, Inc.*, No. 14-CV-6307 (JPO), 2017 WL 6502221, at *9 (S.D.N.Y. Dec. 18, 2017).

New State Standards of Employer Liability for Sexual Harassment of Non-Employees

Prior to the recent enactment, the NYSHRL held employers liable only for sexual harassment of *employees*; employers were not liable for sexual harassment of independent contractors in the workplace. *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir. 2000) (Title VII and the NYSHRL "cover 'employees,' not independent contractors"); *see also Banks v. Corr. Servs. Corp.*, 475 F. Supp. 2d 189, 198 (E.D.N.Y. 2007) ("[i]ndependent contractors are not employees for purpose of NYSHRL"). In this regard, the NYSHRL stood in sharp contrast to the NYCHRL, which always protected independent contractors from sexual harassment if they "carr[ied] out work in furtherance of an employer's business enterprise." *Banks*, 475 F. Supp. 2d at 198 (citing N.Y.C. Admin. Code § 8-102(5)).

Now, under the new state law, employers will be liable for sexual harassment in the workplace experienced by employees and several categories of non-employees, including contractors, subcontractors, vendors, consultants, and other persons providing services pursuant to a contract, as well as their respective employees. N.Y. Exec. Law § 296-d. Importantly, the new state law still does not expand employer liability to cover sexual harassment of customers or clients. Employers in New York state will be held liable for sexual harassment committed against these non-employees in the workplace when the employer, its agents, or supervisors "knew or should have known" about the offensive conduct and "failed to take immediate and appropriate corrective action." *Id*. When analyzing claims by non-employees, the court will consider the "extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser." *Id*.

Prohibitions on Mandatory Arbitration Clauses and Nondisclosure Agreements

As of July 11, 2018, the new state laws prohibit New York employers from including two particular provisions in any settlement, written agreement or other resolution of any claim pertaining to employment if they involve or otherwise relate to allegations of sexual harassment. First, employers may not include in any written agreement a provision mandating arbitration of sexual harassment claims or allegations, *unless the prohibition conflicts with relevant law*. CPLR 7515. Second employers may not require an employee to sign a nondisclosure clause regarding "any settlement agreement, or other resolution of any claim, *the factual foundation for which* involves sexual harassment," unless the condition of confidentiality is the complainant's preference. N.Y. Gen. Oblig. § 5-336; CPLR 5003-b (emphasis added).

The prohibitions on non-disclosure provisions and on arbitration are less clear than they first appear. Determining what constitutes a sexual harassment claim or allegation, or whether the "factual foundation" of a claim involves sexual harassment may be challenging, as the line between a gender discrimination claim and a sexual harassment claim can often be blurry, particularly when the claim is not asserted in a formal court complaint. Moreover, the definitional ambiguities between the NYSHRL and NYCHRL law make it difficult to distinguish which gender-based claims would and would not fall under the nondisclosure and arbitration bans, or whether overlapping claims of gender-based differential treatment could be separated at all. For example, if a female plaintiff brought a gender discrimination claim that would qualify as sexual harassment under the NYCHRL but not under the NYSHRL, it is unclear whether the new state law banning nondisclosure agreements and mandatory arbitration would apply to the sexual harassment claims recognized by the NYCHRL. Furthermore, even if the claim qualified as sexual harassment under the NYSHRL, it remains to be seen whether other gender discrimination claims that share the same "factual foundation" would be barred from nondisclosure agreements or mandatory arbitration. For this reason, any written agreement that contains a broad non-disclosure provision, but with a carve-out only for sexual harassment claims, may nevertheless be insufficient under the new law.

The *Epic Systems* Decision and Mandatory Arbitration

New York's prohibition on mandatory arbitration of sexual harassment claims stands in tension with the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018). There, the Court considered three consolidated cases, each in which an employee, who had signed an employment agreement containing an arbitration provision, sought to bring individual and collective claims in federal court. The issue before the Court was whether the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements – precluding the employees from bringing their claims in federal court – or whether the agreements to individually arbitrate violated the National Labor Relations Act (NLRA), and instead fell within the FAA's "savings clause" – permitting the employees to bring their claims in federal court. While the FAA generally requires courts to enforce arbitration agreements as written, the FAA's savings clause removes that obligation where the agreement at issue violates another federal law. *Id.* at 1626 (citing 9 U.S.C. §2). In *Epic Systems*, the employees argued that the requirement to individually arbitrate each claim violated the NLRA, which permits employees to work together for mutual aid and protection. The Court disagreed, holding that the FAA mandates the enforcement of arbitration agreements as written, and ruling that the requirement to individually arbitrate class and collective wage and hour disputes did not violate the NLRA so as to nullify the FAA. While Justice Ginsburg, in a 30-page dissent, lamented that the ruling could lead to the under enforcement of statutes designed to advance the well-being of vulnerable workers, *id.* at 1647, the majority asserted that the "Court is not free to substitute its preferred economic policies for those chosen by [Congress]" and noted that the FAA specifically directs courts "to respect and enforce the parties' chosen arbitration procedures." *Id*. at 1621.

The decision leaves commentators and practitioners wondering how the New York State law will fare against the Supreme Court's ruling. Presumably drafted in anticipation of the *Epic Systems* decision, the state law contains a carve-out so that the prohibition will not apply "where inconsistent with federal law." N.Y. C.P.L.R. 7515(4)(b)(iii). Therefore, employers in New York State will be prohibited from requiring employees to arbitrate sexual harassment claims only when the arbitration provision falls outside the scope of the FAA. As a practical matter, an agreement to arbitrate will rarely fall outside the purview of the FAA, as the scope of the FAA is extremely broad, governing any agreement to arbitrate if some economic activity of one of the parties has a nexus to interstate commerce. *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 273-74 (1995). Only when the contracting parties expressly manifest their intention to opt out of the FAA within the agreement itself will state law then govern. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995). A vague expression of intent, such as a contract's general choice-of-law clause selecting New York law, is an insufficient expression of the intent required to opt out of the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 62-64 (1995). Thus, in most cases, the new prohibition on mandatory arbitration of sexual harassment claims will be trumped by the FAA, which expressly preempts state laws that obstruct the accomplishment of the FAA's objectives, (*i.e.*, enforcement of the arbitration agreement in accordance with its terms). *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

California is considering similar legislation against mandatory arbitration of sexual harassment claims in a bill that legislators contend will withstand FAA preemption and potential conflict with the Supreme Court's *Epic Systems* decision. Currently pending in the State Senate, AB 3080 would bar employers from forcing employees to sign mandatory arbitration agreements as a condition of employment or employment-related benefits. Specifically, the bill prohibits employers from requiring employees or applicants for employment to "waive any right, forum, or procedure" to file a claim under the state's anti-discrimination law in order to obtain employment, continue in the job, or receive an employment-related

benefit. The bill also protects individuals from retaliation for refusing to sign such an agreement.

Recognizing the federal policy in support of arbitration, California lawmakers believe that the bill will not be preempted by the FAA because it arguably does not disfavor arbitration agreements or make them unenforceable.[5] In contrast to New York's prohibition, which renders mandatory arbitration clauses of sexual harassment claims "null and void," the California bill recognizes arbitration agreements as valid, as long as employees voluntarily entered into them without the threat of retaliation or the prospect of being denied employment or an employment-related benefit. Acknowledging that the FAA prevents state legislatures from enacting policies that unduly impede arbitration, proponents of the California bill have argued that the bill does not discriminate against arbitration or interfere with the enforcement of an arbitration agreement.[6] Instead, the bill "would ensure employees may choose to waive their rights in order to get or keep a job, but they are never forced to."[7] In 2015, Governor Jerry Brown vetoed a similar bill banning mandatory arbitration agreements as a condition of employment, specifically citing concerns about the FAA and conflicts with Supreme Court decisions.[8]

A Potential Loophole?

In the wake of the *Epic Systems* decision, some states are turning to their own legislatures to provide workers with an alternative path to litigate their employment claims in court. In New York, a pending bill titled the "Empowering People in Rights Enforcement (EMPIRE) Consumer Protection Bill," modeled on California's Private Attorney General Act (PAGA), would enable workers to bring a public enforcement action on behalf of the state for violations of the state labor laws. S.6553, 2017-2018 Leg. Sess. (N.Y. 2017). California's PAGA law deputizes private citizens to enforce California's labor laws on behalf of the state Labor and Workforce Development Agency. Cal. Lab. Code §§ 2698 to 2699.5. PAGA actions "directly enforce *the state's* interest in penalizing and deterring employers" who violate state law. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 152 (Cal. 2014) (emphasis in original). The California Supreme Court has held that the FAA does not preempt state laws that prohibit employers from waiving an employee's ability to bring a PAGA action. *Id*. at 133. Therefore, if EMPIRE is passed in New York, the PAGA-like law could provide a potential loophole to the FAA pre-emption issue and allow employees to bring claims in state court that could otherwise only be arbitrated.

Training and Policy Requirements

Finally, the new City and State laws both contain new requirements regarding employers' sexual harassment policies and anti-harassment training, designed to educate and raise awareness to combat sexual harassment in the workplace. By September 6, 2018, all employers in New York City must conspicuously display anti-sexual harassment rights and responsibilities posters designed by the NYCCHR in employee breakrooms or other employee common areas. N.Y.C. Admin. Code § 8-107(29). Additionally, at the time of hire, all NYC employers must distribute to new employees an information sheet developed by the NYCCHR regarding sexual harassment; this information may be included in the employee handbook. N.Y.C. Admin. Code § 8-107(29)(e). And by October 9, 2018, all employers in New York State must have a sexual harassment prevention policy that meets the minimum requirements to be established by the New York State Department of Labor and the New York State Division of Human Rights. N.Y. Lab. Law § 201-g. Although yet to be drafted, the model sexual harassment prevention policy will include the following provisions: an express prohibition of sexual harassment and examples of prohibited conduct, information on remedies available to victims, a standard complaint form, and the procedure for the timely and confidential investigation of complaints.

Furthermore, the City and State laws will now require employers to provide anti-harassment training annually to all employees. Effective October 9, 2018, the NYS law requires employers to follow an interactive model training program to be developed by the New York State Department of Labor and the New York State Division of Human Rights. N.Y. Lab. Law §

201-g(2).The new City law also requires employers to provide an annual "interactive" anti-sexual harassment training. NY City Charter § 815.1.While the training need not be live or facilitated by an in-person instructor, the training must involve participatory demonstrations as determined by the NYCCHR, whereby the employee is engaged in trainer-trainee interaction, for example, through the use of audio-visuals or an online program. *Id*.

Key Takeaways for Employers

State legislatures across the country are standing up for the #MeToo movement, enacting new laws to maximize transparency and hold more employers liable for more individuals' complaints about sexual harassment.

In light of the new legislation, New York employers must carefully craft non-disclosure agreements, as any claim, "*the factual foundation for which involves sexual harassment,*" may not be included in such agreements unless it is the complainant's preference. Employers should also be aware of the uncertainty surrounding mandatory arbitration agreements. While most arbitration agreements are likely to fall within the FAA, those outside the scope of the FAA are now expressly prohibited under New York State law. Finally, starting October 9, 2018, employers must now provide *interactive* sexual harassment training to all employees on an annual basis. While the training need not be live or facilitated by an in-person instructor, the interactive training must be participatory, whereby the employee is engaged in trainer-trainee interaction, for example, through the use of audio-visuals or an online program.

UK Off-Payroll Working: The So-Called "IR35" Rules and Proposals for Reform

By Ivor Gwilliams, Oliver Walker, and David Palmer

The UK Government introduced the so-called "IR35" rules 18 years ago in order to discourage tax avoidance arising from situations where individuals supplied services through an intermediary. The UK Government now believes that there is widespread non-compliance with the rules, and is proposing a number of changes. If implemented, these changes would make it less attractive for private sector clients to engage individuals via an intermediary. Clients who engage individuals in this way should review the arrangements, and assess whether they would stand up to scrutiny if the Government implemented the changes. Similarly, clients looking to acquire businesses that have adopted intermediary arrangements should consider extending the scope of their tax and employment due diligence to confirm whether the business is "future-proofed" against subsequent implementation.

What are the IR35 Rules?

The IR35 rules (named after the press release that foreshadowed the operative legislation) were introduced in 2000 specifically to deal with the situation whereby an individual provides his/her services to a client through an intermediary company in which he/she has an interest (often referred to as a personal services company). The individual might be the sole shareholder and director of the intermediary company, or one of the shareholders/directors together with, say, members of their family. The intermediary will then "hire out" the individual to the client. [9]

The client will pay a fee to the intermediary company in return for the services provided to it. Typically, the individual will receive only a small amount of cash (if any) by way of salary from the intermediary company. The profit made by the intermediary company will then be subject to UK corporation tax rates – currently 19 percent, but falling to 17 percent in 2020. These rates are much lower than those that apply to employment income (up to 45 percent) and (unlike employment income) the profit will not be subject to social security contributions – known in the UK as National Insurance contributions (NICs) – including a 13.8% NICs charge for the employer. The balance may be either paid to the individual as a dividend (subject to dividend income tax rates of up to 38.1 percent), or retained by the intermediary company. In the latter case, the retained amount may ultimately be paid out on liquidation of the intermediary company,

when it may constitute chargeable gains, subject to capital gains tax of up to 20 percent.

Clearly, tax advantages may arise (for the client as well as the individual) where the individual is not an employee. Accordingly, the IR35 rules restrict arrangements that might otherwise seek to take advantage of the more favorable tax rates. In essence, the rules will apply where the individual personally performs services for the client and, but for the existence of the intermediary company, would be regarded as an employee (or, in some cases, a director) of the client for tax purposes. In such a scenario, the fee paid to the intermediary company will constitute employment income paid by the intermediary company to the individual for tax and NICs purposes. In other words, the IR35 rules will operate to treat the intermediary company as the individual's employer and, as a result, it will be liable to account for income tax and NICs in relation to the fee, plus possibly interest and penalties for any non-compliance with the IR35 rules.

As the effect of IR35 is to shift the potential liability for tax and NICs from the client to the intermediary company, many clients prefer, notwithstanding the risk of reclassification, to engage consultants/independent contractors through intermediary companies (and may sometimes insist upon it). To this extent, the IR35 rules have possibly encouraged rather than discouraged the use of these arrangements; over recent years, the press has highlighted various examples of corporations paying fees to intermediary companies, along the lines detailed above.

Perhaps due to such behavior, the Government last year changed the IR35 rules as they apply in the public sector. As a result, it is the public sector client (rather than the intermediary) that is responsible for accounting for the income tax and NICs on the fee paid to the intermediary company. This in turn means that the client (rather than the intermediary) will likely be the one to determine employment status. Arguably, this is a more just position where the client would typically be more familiar with dealing with employees, and may already have an existing payroll structure across much of its workforce.

The Government considers the new rules to be a success: it estimates that an additional £410m of income tax and NICs have been collected since their introduction. However, it estimates that lost tax revenue resulting from non-compliance with the IR35 rules will still reach £1.2 billion in 2022/23 (the Government claims that around a third of people working through their own company fall within the scope IR35, but only 10 percent of intermediary companies that should apply the IR35 rules, actually do so).

It is perhaps not surprising therefore, that the Government is now consulting on whether to extend to the UK private sector the same changes it made last year in respect of the public sector. If such changes are implemented it will become even more important for private sector clients to determine on an ongoing basis whether the individual would (but for the existence of the intermediary company) be deemed an employee of the client. Unfortunately, this not an easy task, given that the rules governing employment status are complex and, many would argue, uncertain (although the UK tax authorities have published an online tool designed to simplify the job).

While the Government considers an extension of the new rules to the private sector to be its 'lead option,' it has suggested other approaches, including requiring businesses to diligence more fully its labor supply chains, and/or keep more detailed records relating to any off-payroll arrangements (although it is acknowledged that the resulting compliance burden may prove challenging). However, the safest approach is to assume the Government will extend the rules.

The consultation has met with some negative responses in the business community. One concern is that some contractors (particularly those with particularly rare or specialized skills) may charge a premium to negate the risk of reclassification, while others may avoid taking on jobs altogether where the extended rules may apply. It is also possible that clients will look to simplify their compliance burden by assuming that the new rules catch all their contractors, notwithstanding the employer's NICs cost, and regardless of whether the contractor

actually satisfies the employment status requirements.

What Should Clients Be Doing Now?

Clients should review any arrangements they currently have in place with intermediary companies and assess whether they would stand up to scrutiny under the proposed changes to the IR35 rules. For any clients that make considerable use of intermediaries for services, the proposed changes to the rules could have far-reaching consequences. Some clients may only have administrative changes to consider, such as changing their onboarding process for new consultants in order to comply with a potentially more comprehensive due diligence process. Other clients may need to rethink their use of intermediaries altogether.

Clients looking to acquire businesses that make use of intermediary arrangements should consider asking their advisors to focus on possible vulnerabilities under the new rules, and we expect clients will want to scrutinize to a greater degree the non-employee status of any contractors. Depending upon the size and nature of the business's work force, the potential additional costs that would arise from a reclassification of individuals historically treated as independent contractors could materially affect the value ascribed to the investment, and may lead to conversations around contractual protections.

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[1] The primary laws regulating discrimination in New York are Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), the New York State Human Rights Law (NYSHRL) N.Y. Executive Law §§291, 296-a (McKinney 2005), and the New York City Human Rights Law (NYCHRL) 18 N.Y. Jur. 2d Civil Rights § 12.

[2] Earlier this year, the New York State Senate passed a bill substantially similar to the Governor's legislation, but that included an explicit definition of "sexual harassment." The proposed definition would create a uniform definition of sexual harassment based on the federal regulations. 2018 NY Senate Bill S7848-A. Advocates of the bill explained that the lack of definition leaves litigants subject to varying interpretations by judges, who may improperly dismiss sexual harassment cases at the outset. However, the Senate bill failed to pass the state Assembly.

[3] Vivian Wang, *New York Rewrites Harassment Laws, but Some Say the Changes Fall Short*, N.Y. Times (Mar. 30, 2018), https://www.nytimes.com/2018/03/30/nyregion/new-york-revised-sexual-harassment-laws.html.

[4] Under the NYSHRL and NYCHRL, employers may also be held vicariously liable for sexual harassment by an employee. The NYSHRL holds employers liable for an employee's discriminatory conduct only if the employer "became a party to [the conduct] by encouraging, condoning, or approving it." *New York State Div. of Human Rights v. ABS Elecs., Inc.*, 958 N.Y.S.2d 502, 504 (N.Y. App. Div. 2013). In contrast, the NYCHRL imposes *strict liability* on employers where: (1) the employee "exercised managerial or supervisory responsibility"; (2) the employer "knew of the employee's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action"; or (3) where the employer "should have known of the employee's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct." N.Y.C. Admin. Code § 8-107(13).

[5] Bill Analysis (Senate Judiciary): http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3080.

[6] *Id.*

[7] *Id.*

[8] https://www.gov.ca.gov/wp-content/uploads/2017/09/AB_465_Veto_Message.pdf.

[9] The rules can also apply to intermediaries that are partnerships or individuals although, in practice, an intermediary is usually an incorporated company and, therefore, this update focuses on corporate intermediaries.

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