

Employment Law Changes Affecting New York Employers

May 2018

Authors: [Tal Marnin](#), [Robin Heszel](#), [DeVoia Stewart](#), [Arian Mossanenzadeh](#), [Harry Hudesman](#)

Employers should be aware of recent changes to New York State and New York City employment laws. These changes concern the following: (i) protections relating to sexual harassment; (ii) the use of earned sick time for “safe time”; (iii) the implementation of Paid Family Leave; (iv) additional requirements when making reasonable accommodation determinations; (v) expanded definitions under the New York City Human Rights Law; and (vi) the enforceability of class action waivers with respect to freelance workers. A brief summary of these recent changes are provided below.

NYS and NYC Add Substantial Sexual Harassment-Related Protections

The New York State Legislature recently adopted the following new requirements relating to sexual harassment for all New York State employers:

- No written contracts entered into **on or after July 11, 2018** may contain a mandatory arbitration clause relating to allegations or claims of sexual harassment thereafter arising, where such clause provides that the facts founds or determination made by the arbitrator shall be final and not subject to independent court review. Any such clause shall be null and void, but the inclusion of such a clause in a written contract shall not invalidate any other provision in the contract. [Note that this provision may be pre-empted by the Federal Arbitration Act, where applicable.]
- Settlements involving claims of sexual harassment and entered into **on or after July 11, 2018** may not include confidentiality provisions preventing the disclosure of the underlying facts and circumstances to the claim, unless (i) the condition of confidentiality is the “complainant’s preference,” (ii) such preference is memorialized in a written agreement signed by all parties, and (iii) the employee is provided a non-waivable 21 days to consider the terms of the agreement and seven (7) days following execution of the agreement in which to revoke the agreement.
- **Effective immediately**, the New York State Human Rights Law prohibits sexual harassment of “non-employees” in the workplace. For this purpose, non-employees includes contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace or who is an employee of such contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace. Employers will be responsible for sexual harassment against any of these non-employees when the employer, its agents or supervisors knew or should have known of such sexual harassment and failed to take immediate and appropriate corrective action. In reviewing these cases, 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 must be considered.

- **Effective October 9, 2018**, all employers in New York State (regardless of size) will be required to adopt a model sexual harassment prevention policy and utilize a model sexual harassment prevention training program, either in the form produced by the New York State Department of Labor (the “**NYSDOL**”) or in a form that otherwise equals or exceeds the minimum standards provided by such model policy and model training. The model policy must include, among other things, a standard complaint form. Employers will be required to provide the sexual harassment prevention policy to all employees in writing and to provide the sexual harassment prevention training to all employees on an annual basis.

The New York City Council also passed the Stop Sexual Harassment in NYC Act (the “**NYC Act**”), which is a package of laws designed to prevent workplace sexual harassment. The NYC Act is pending the signature of Mayor Bill de Blasio (which is expected shortly). The NYC Act will provide for the following, among other things:

- **Effective immediately upon becoming law**, the New York City Human Rights Law (“**NYCHRL**”) will apply to all employers in New York City regardless of size, with regard to claims based on gender-based harassment. The NYCHRL continues to apply only to employers with four (4) or more employees (including natural persons employed as independent contractors who are not themselves employers) for all other areas of discrimination and harassment. In addition, the statute of limitations for such gender-based harassment claims to be heard by the New York City Commission on Human Rights will be extended from one year to three years after the alleged harassing conduct occurred.
- **Effective 120 days after the Act becomes law**, the law will require all employers in New York City (a) to conspicuously display an anti-sexual harassment rights and responsibilities poster designed by the New York City Commission on Human Rights (which must be in English and Spanish), and (b) to distribute an information sheet on sexual harassment to all employees at the time of hire—such information sheet may be included in an employee handbook.
- **Effective April 1, 2019**, all New York City employers with 15 or more employees must conduct an anti-sexual harassment interactive training for all employees, including interns, supervisors and managerial employees. Supervisors and managers must receive additional training. New hires must receive training within 90 days after the date of initial hire (but employees who have received such training at another employer with the required training cycle are not required to receive additional training until the next cycle). The interactive training may consist of, among other things, a computer or online training program and need not be live or facilitated by an in-person instructor. Employers are required to keep a record of all trainings, including a signed employee acknowledgment (which may be electronic).

NYC Earned Sick Time Act Also Now Covers “Safe Time”

Effective May 5, 2018, pursuant to an amendment, the New York City Earned Sick Time Act will be known instead as the New York City Earned Safe and Sick Time Act (the “**ESSTA**”). The amendment provides that employees in New York City may use earned sick time for “safe time” if the employee or the employee’s family member is a victim of a family offense matter, sexual offense, stalking or human trafficking. The ESSTA defines a family offense matter generally to cover harassment, sexual abuse, sexual misconduct, reckless endangerment, assault, identity theft, grand larceny and other offenses between spouses, former spouses, a parent and child, persons who have a child in common and persons who are or have been in an intimate relationship.

Generally, qualifying safe time leave may be used to: obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program; take actions to increase the safety of the employee or a family member of the employee, including to participate in safety planning or to relocate; meet with an attorney or social service provider; file a complaint or domestic incident report with law enforcement; meet with a district attorney’s office; enroll children in a new school; or take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or a family member of the employee or to protect those who associate or work with the employee.

Employers may require reasonable advance notice—not to exceed seven days—of the need to use sick or safe time, to the extent such leave is foreseeable, or as soon as practicable if not foreseeable. The Company may require written confirmation from the employee that he or she used sick time for the purposes provided under the ESSTA. If an employee takes **more than** three (3) consecutive work days for sick or safe time, the employer may require reasonable documentation to confirm that the use of such leave was authorized by the ESSTA. For sick time, reasonable documentation is a signed document by a licensed healthcare provider indicating the amount of sick time needed (without specifying the nature of the employee's or the employee's family member's injury, illness or condition, except as required by law). For safe time, such reasonable documentation can include (i) documentation from a victim services organization, attorney, clergy member, medical or other professional service provider from whom the employee or his or her family member sought assistance, (ii) a police or court record or (iii) a notarized statement from the employee explaining the need for safe time, in each case without specifying the details of the related matter.

Health information about an employee or his or her family member, and information concerning an employee's or his or her family member's status or perceived status as a victim of a family offense matter, sexual offense, stalking or human trafficking, shall be kept confidential and shall not be disclosed except by the affected employee, with the written permission of the employee or as required by law.

The ESSTA also broadens the use of sick and safe time by expanding the definition of "family members" for which such time can be used. In addition to the prior individuals covered by this definition—employee's child (biological, adopted or foster child, legal ward, child of an employee standing *in loco parentis*); grandchild; spouse; domestic partner; parent; grandparent; child or parent of employee's spouse or domestic partner; and sibling (including a half, adopted or step sibling)—the definition will now also cover any other blood relative of the employee, and any other individuals whose association with the employee is the equivalent to that of a family member.

Employers must provide written notice to their employees of their right to safe time within 30 days of the ESSTA's effective date (on May 5, 2018). New hires starting work on or after June 5, 2018 must receive such written notice at the commencement of their employment.

NYS Paid Family Leave Regulations in Effect

New York State adopted Paid Family Leave regulations implementing the NYS Paid Family Leave Law. As reported in our **June 2016 Client Alert**,¹ New York State employers are now required to provide paid time off for employees to bond with newly born, adopted, or fostered children, care for family members with serious illness, or assist loved ones when a family member is deployed abroad on active military service. Employees intending to take Paid Family Leave must provide employers with at least 30 days' notice prior to their intended leave date; if the circumstances are unforeseeable, notice must be given as soon as possible.

Full-time employees (who have worked 26 consecutive weeks) and part-time employees (who work less than 20 hours per week and have worked a total of 175 days) will be eligible for up to eight (8) weeks of paid family leave per year, increasing to 10 weeks beginning January 1, 2019 and 12 weeks in 2021. Employees will receive at least 50% of their average weekly wage, capped at 50% of the state average weekly wage, during such leave. The percentages increase every January 1, up to 67% in 2021.

Employers must obtain Paid Family Leave insurance, which is generally added to an existing disability insurance policy. Employees fund this new benefit, however, by contributing a set proportion of their weekly wages through a payroll deduction set by the NYSDOL. The 2018 payroll deduction will be 0.126% of the employee's weekly wage, capped at \$85.56 annually, and will be adjusted annually.

Pursuant to the regulations, employers should inform their employees about the new Paid Family Leave requirements, including through distribution of updated employee handbooks that reflect Paid Family Leave benefits. These updates should include: (i) the name of the Paid Family Leave insurance carrier or a statement that the employer is self-insuring for coverage; (ii) whether the employer permits employees to use

¹ <https://www.whitecase.com/publications/alert/employment-law-roundup-summary-recent-changes-affecting-new-york-employers>

accrued time off to supplement Paid Family Leave benefits; (iii) whether Paid Family Leave must be taken concurrently with any other type of leave (e.g., maternity leave); (iv) employees' responsibility for covering health insurance premiums while out on leave; (v) instructions on how to request Paid Family Leave; and (vi) whether the employer is subsidizing all or part of the cost of its employees' Paid Family Leave premiums.

NYC Employers Must Engage in Dialogue Regarding Reasonable Accommodations

The NYCHRL requires that employers, among others, provide reasonable accommodations to victims of domestic violence as well as individuals with pregnancy, childbirth or related conditions, religious needs and/or disabilities. Pursuant to an amendment, **effective on October 15, 2018**, the NYCHRL will require employers to engage in a "cooperative dialogue" with individuals who are or may be entitled to an accommodation under the NYCHRL within a reasonable time of receiving a request for an accommodation or notice that an accommodation may be required.

The term "cooperative dialogue" means the process of engaging in a good faith dialogue, either written or oral, regarding a person's accommodation needs. Under the amendment, employers must provide a written determination to the individual who requested the accommodation, which identifies the accommodation that has been granted or denied. A covered entity may only come to the determination that no reasonable accommodation "would enable a person to satisfy the essential requisites" of his or her job after it has engaged or attempted to engage in a cooperative dialogue. An employer's obligation to engage or attempt to engage in a cooperative dialogue need not be prompted or initiated by an accommodation request.

NYC Human Rights Law Expands Definitions of 'Gender' and 'Sexual Orientation'

The New York City Council also amended the NYCHRL by expanding the definitions of "sexual orientation" and "gender." The law, which currently prohibits discrimination against employees on the basis of sexual orientation and/or gender, will offer employees more protections under the NYCHRL. The revised law will become **effective on May 11, 2018**. Under the new law, the definition of "sexual orientation," which previously covered "heterosexuality, homosexuality, or bisexuality" was amended to include an "individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender" and also includes protections for individuals who identify as asexual or pansexual. The law also revises the definition of "gender" to clarify that it includes "a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

New York City (and Possibly Other) Freelance Workers Cannot Waive Right to Participate in Class Actions

As discussed in our **April 2017 Alert**,² the Freelance Isn't Free Act ("FIFA") passed by the New York City Council last year provides certain protections for freelance workers against nonpayment. Such protections include, but are not limited to, the requirement that freelance services having a value of \$800 or more be set forth in a written contract. According to rules adopted by the New York City Department of Consumer Affairs ("DCA"), such protections also include a prohibition on any waiver or limitation of a freelance worker's right to participate in or receive money or other relief from any class, collective, or representative proceeding, and any other procedural right normally afforded to a party in a civil or administrative action. Pursuant to the rules, any such waiver or limitation is void. Any person who denies work to a freelance worker who exercises or attempts to exercise a right under FIFA or deters a freelance worker from exercising or attempting to exercise such right, will be liable for retaliation under FIFA.

² <https://www.whitecase.com/publications/alert/two-new-rules-new-york-city-employers>

FIFA defines freelance workers broadly as any *individual* hired or retained as an independent contractor by a hiring party to provide services for compensation (excluding certain sales representatives, attorneys and licensed medical professionals) and includes individuals even if they provide services through a corporate entity composed solely of the individual or if they use a trade name. Frequently Asked Questions published by the DCA state that “[FIFA] is a New York City law. While judges will decide how the Law applies in each case, the Law does apply to work performed inside New York City **and may apply to work performed outside New York City depending on the overall circumstances**. For example, whether the Law applies may depend on whether some, but not all, of the work is performed in New York City, the freelance worker is hired or retained in New York City, or the hiring party has significant operations in New York City.” (Emphasis added)

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.