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Maryland's New Sexual Harassment Law Takes Effect Oct. 1 – Is Your Business Ready?

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SUMMARY: Maryland's new Disclosing Sexual Harassment in the Workplace Act, will go into effect on October 1, 2018. The new law does two big things: (1) it prohibits waivers of future claims of sexual harassment or related retaliation, and (2) it requires employers with more than 50 employees to complete two surveys reporting their sexual harassment claims and settlements.

Like some other states and localities, Maryland has responded to the *#metoo* movement by enacting legislation targeted at limiting employers' ability to avoid sexual harassment claims or keep such claims under wraps. Compared to other recently enacted legislation (for example New York's), Maryland's law is on the less restrictive end of the spectrum. **However, employers are still well advised to take a serious look to confirm, not only that they are currently in compliance, but also that they have the systems in place to comply with the reporting requirements coming down the pike.**

Prohibition Against Waivers

he first important piece of the new law is that it states that any contract, policy or agreement that "waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment" will be null and void for being against public policy.

Practically, what does this mean for employers?

- The restrictions only apply to waivers of claims that accrue in the future. In other words, the new law will not prohibit agreements in which an employee, or former employee, waives already existing/accrued sexual harassment or related retaliation claims (whether the individual knows about those claims or not). These types of waivers are commonly seen in settlement and severance agreements.
- The prohibition extends not just to the waiver of the substantive claims but also to procedural rights and remedies related to sexual harassment or related retaliation claims. There has been much discussion about whether the new law will prohibit arbitration agreements that would extend to future sexual harassment or related retaliation claims. We hope to see this clarified in the coming months. However, until regulations or guidance is issued clearing up this question, employers who currently use arbitration agreements should be aware that going forward these agreements may not be enforceable to compel arbitration of sexual harassment and related retaliation claims.
- The law also prohibits retaliation against an employee who refuses to sign an agreement that includes a prohibited waiver.
- Interestingly, employers will only face penalties for violating this part of the new law if they actually try to enforce a prohibited agreement. The fact that an employer has had an employee sign an agreement that would be null and void under the law will not give rise to any fine or penalty. However, if an employer tries to enforce such an agreement against an employee, the employer will be responsible for paying the employee's reasonable attorney's fees and costs. This shifting of the fees and costs is another reason why, until the issue is clarified, employers with arbitration agreement should be careful about trying to enforce such an agreement in a sexual harassment case.

Reporting

The new law also includes a reporting component for employers with 50 or more employees. These employers will be required to complete and submit an electronic survey to the Maryland Commission of Civil Rights by July 1, 2020, and again by July 1, 2022.

The survey will require the employer to disclose the following:

"(i) the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;

(ii) the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and

(iii) the number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential."

As part of the survey, the employer will also have an opportunity to report if it took any personnel action with respect to an employee against whom multiple sexual harassment claims have been made.

The Commission will aggregate the information for public dissemination and create an executive report based on a review of the random selection of the surveys. **However, under the law, the Commission is instructed retain each employer's response and make such response available for public inspection upon request.**

Employers who will be subject to the reporting requirement are well advised to (1) ensure that they are collecting and retaining the information that they need to complete the survey, and (2) be aware of and consider the potentially public nature of their survey responses when considering whether to enter into a settlement.

