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New York State Legislation Significantly Expands Workplace Harassment Protections

The Bottom Line

- New York State's new legislation will provide workers with significantly expanded protections against workplace harassment, including a lower standard for asserting — and prevailing — on harassment claims and the availability of punitive damages and attorneys' fees for successful claims.
- These changes build on the state's 2018 reforms to the New York State Human Rights Law and other state laws, which required mandatory anti-harassment policies and training, as well as restrictions on the use of confidentiality and mandatory arbitration clauses with respect to sexual harassment claims.
- Governor Cuomo is expected to sign the bill into law; as such, employers should be aware of and prepare for the impending changes.

In June, the New York State Legislature approved a bill that will effect sweeping changes to New York's laws protecting employees from harassment, discrimination and retaliation in the workplace.

New York Employers of All Sizes Now Covered

The bill would amend the New York State Human Rights Law (NYSHRL) to cover all employers within New York State, regardless of size. Currently, the NYSHRL only applies to employers with four or more employees, except with respect to sexual harassment claims, which covers employers of all sizes. This change goes into effect 180 days after enactment (i.e., the date Governor Cuomo signs the bill) for claims filed after that date.

Lowered Burden of Proof for Harassment Claims

Elimination of "Severe or Pervasive" Standard

Under current New York law (as well as under Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law), a complainant must show that workplace harassment is "severe or pervasive" in order to prevail on his or her claim. By contrast, the new bill provides that harassment on the basis of any protected characteristic is unlawful, "regardless of whether such harassment would be considered severe or pervasive." A complainant must show only that he or she was subjected to "inferior terms, conditions or privileges of employment because of the [complainant's] membership in one or more of the [NYSHRL's] protected categories," and would not be required to point to a comparator (i.e., someone outside the complainant's protected class who was treated more favorably) in order to prevail on a harassment claim. Additionally, the bill gives employers an affirmative defense if they can show that the alleged harassment is nothing more than what a "reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." This affirmative defense brings the NYSHRL standard in line

with the “petty slights or trivial inconveniences” standard already in place under the New York City Human Rights Law.

Faragher/Ellerth Defense No Longer Available

Under the bill, employers will no longer be able to defend against NYSHRL harassment claims by asserting that the complainant unreasonably failed to utilize the employer’s internal complaint procedures, i.e., the *Faragher/Ellerth* defense. Indeed, the bill states that “[t]he fact that such individual did not make a complaint about the harassment to such employer…shall not be determinative of whether such employer…shall be liable.” The *Faragher/Ellerth* defense — which arose under a pair of 1998 cases interpreting Title VII — will still be available in response to an employee’s federal discrimination claims.

These two changes to a complainant’s burden of proof go into effect 60 days after enactment for claims filed on or after that date.

Extended Statute of Limitations

Individuals now have three years to file claims of sexual harassment with the New York State Division of Human Rights (DHR), as opposed to the one-year statute of limitation that is currently in place. This change goes into effect one year after enactment for claims filed after that date. All other discrimination claims still must be filed within one year of the alleged discriminatory act.

Punitive Damages and Attorneys’ Fees Available

Under current state law, punitive damages and attorneys’ fees are only available in housing discrimination cases, and are awarded on a discretionary basis. The new bill provides for uncapped punitive damages awards in employment discrimination cases involving private employers. This change goes into effect 60 days after enactment for claims accrued on or after that date. Furthermore, awards of reasonable attorneys’ fees may be available to the prevailing party in employment discrimination claims. Attorneys’ fees are available whether the claim is filed in court or with the DHR. Significantly, in order for a prevailing employer to recover attorneys’ fees, it must show that the complainant’s action was frivolous (i.e., that the action was filed or continued in bad faith). This attorneys’ fees provision goes into effect 60 days after enactment for claims accrued on or after that date.

Non-Employees and Domestic Employees

Subject to Same Protections as Employees Employers may recall that in 2018, the NYSHRL was amended to add protections against sexual harassment for non-employees (e.g., contractors, subcontractors, vendors, consultants and others providing services pursuant to a contract). Under the new bill, non-employees will be protected against discrimination on the basis of **any** protected category under the NYSHRL, not just sexual harassment. This change goes into effect 60 days after enactment for claims filed on or after that date. Additionally, domestic workers will have the same NYSHRL protections as all other employees. Currently, the NYSHRL only protects domestic workers from harassment directed at them and does not protect them against retaliation for complaining about improper conduct. This change goes into effect 60 days after enactment for claims filed after that date.

Restrictions on Confidentiality Provisions Extended to All Harassment, Discrimination and Retaliation Claims

In 2018, New York state law was amended to restrict the use of confidentiality provisions in any settlement or other agreement resolving sexual harassment claims, "unless the condition of confidentiality is the complainant's preference." In order to be considered the "complainant's preference," the 2018 amendment required that the complainant be given 21 days to consider the confidentiality provision and seven days following the signing of any agreement containing such a provision to revoke the agreement. The new bill extends this restriction and the corresponding 21-day consideration/7-day revocation mechanism to agreements pertaining to all discrimination, harassment and retaliation claims, not just those involving sexual harassment. Additionally, the confidentiality provision must now be provided in writing to all parties "in plain English, and, if applicable, the primary language of the complainant." This change goes into effect 60 days after enactment for all claims **settled** on or after that date.

Notice Language Required for Confidentiality Provisions in Employment Agreements

The bill also provides that any employment contract entered into on or after January 1, 2020 that includes a confidentiality provision limiting the "disclosure of factual information related to any future claim of discrimination" will be void and unenforceable unless it contains language notifying the employee or prospective employee that the provision does not prohibit him or her from speaking with law enforcement, the U.S. Equal Employment Opportunity Commission, the DHR, any local commission on human rights, or an attorney retained by the employee or prospective employee.

Restrictions on Mandatory Arbitration Clauses Extended to All Harassment, Discrimination and Retaliation Claims

In 2018, New York state law was amended to prohibit — "except where inconsistent with federal law" — any employment contract provision entered into on or after the amendment's effective date requiring the parties to submit sexual harassment claims to mandatory arbitration, and to void any such provisions in existing contracts. The new bill extends this restriction on mandatory arbitration clauses to all discrimination, harassment and retaliation claims, rather than just those involving sexual harassment. However, given the law's inclusion of the proviso "except where inconsistent with federal law," it is possible that the bill's expanded restriction would still be preempted by the Federal Arbitration Act (FAA). In fact, last month, in *Latif v. Morgan Stanley & Co. LLC*, a Southern District of New York judge relied on that exact proviso to hold that an employee's mandatory arbitration agreement (which covered claims of "discrimination, harassment and retaliation") was enforceable and required the employee arbitrate his sexual harassment claims against his employer — despite the above-referenced 2018 ban on mandatory arbitration clauses for sexual harassment claims. The court held that New York's 2018 law did not overcome the FAA's "strong presumption that arbitration agreements are enforceable" and that invalidating the employee's arbitration agreement would be inconsistent with the FAA. Given that the new bill contains the same "except where inconsistent with federal law" language as the 2018 law, it is likely that the interpretation in *Latif* will be applied to mandatory arbitration agreements analyzed under the new bill as well.

Heightened Notice Requirements for Employers

The bill expands upon the 2018 amendments requiring New York employers to implement anti-harassment policies and training by now mandating that employers also provide to all employees, upon hire and at every sexual harassment prevention training, a notice in both English and the employee's primary language

containing the employer's "sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program." The New York State Labor Commissioner will be responsible for publishing policy and training templates in other languages that may be used by employers to fulfill this requirement; employers are only required to provide this notice to employees in English if a template in a particular employee's primary language is not available from the state. This change goes into effect **immediately** upon enactment.

Liberal Interpretation of State Law

Finally, the bill provides that the New York state anti-discrimination law must be construed liberally and that any exceptions to the law must be construed narrowly, regardless of whether similar provisions under federal law have been interpreted the same way. This change goes into effect **immediately** for claims filed after enactment.

Immediate Next Steps

New York employers should begin preparing for the changes described above, including by:

1. determining whether anti-harassment policies and training programs need to be established and/or updated;
2. reviewing their form employment, separation and settlement agreements for confidentiality and/or mandatory arbitration provisions that may need to be revised; and
3. considering how they plan to update their onboarding and anti-harassment training materials to comply with the bill's new notice requirements.

Employers should also be aware that they will need to be more proactive in preventing (and not just addressing) harassment in the workplace, given the lowered standard of proof and heightened monetary liability for NYSHRL harassment claims under the bill. This can be achieved by, among other things, implementing in-person anti-harassment training rather than online or off-the-shelf programs and conducting additional and/or manager-specific training for supervisory employees, who play a key role in setting the tone for appropriate conduct and alerting the employer to potential harassment issues.

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