

EEOC and NYSDHR Matters: Navigating the Changed Landscape

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Agenda for Presentation



- Recent Updates to Federal and State Law Impacting Discrimination Claims
- Procedural Issues and Updates at the NYS Division of Human Rights (“NYSDHR”)
- U.S. Equal Employment Opportunity Commission Procedures
- Settlement Considerations to be Aware of Due to Recent Changes in Law and/or Administrative Enforcement Positions



**RECENT UPDATES TO FEDERAL AND
STATE LAW IMPACTING
DISCRIMINATION CLAIMS
(and a reminder or two)**

Affirmative Action



- On June 29, 2023, in *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College* and *SFFA v. University of North Carolina*, the United States Supreme Court held that Harvard's and the University of North Carolina's admissions programs—which accounted for race at various steps in the admission process in an effort to encourage diversity—violated the Equal Protection Clause of the 14th Amendment.
 - The decision directly affects admissions policies at higher education institutions across the country, but the impact on private employers and other educational institutions was not addressed in the opinion.
 - The language of the majority opinion and certain individual justices suggests that the rejection of the consideration of race, even if to ensure diversity, could apply beyond the higher education context.
 - Employer DEI policies, voluntary affirmative action programs, and environment, social, and governance efforts (ESG) will likely face greater scrutiny.
 - Be aware of the potential for an increase in “reverse discrimination” claims.
- Shortly after the ruling, attorneys general from thirteen states sent a joint letter, to the largest companies in the United States warning them that **race-based preferences “whether under the label of ‘diversity, equity, and inclusion’ or otherwise,” may violate federal and state antidiscrimination laws.**

Religious Accommodations



- The Supreme Court's unanimous decision in *Groff v. DeJoy* has curtailed employers' ability to establish "undue hardship" when assessing an employee's request for a religious accommodation under Title VII of the Civil Rights Act of 1964.
 - Title VII now requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in "substantial increased costs in relation to the conduct of its particular business."
 - The former "*de minimis*" cost or inconvenience standard no longer applies.
- Political tensions in the U.S. and the situation in the Middle East present unique discrimination, harassment and workplace violence considerations for schools and employers.

Pregnant Worker Protections



- Pregnant Workers Fairness Act
 - Passed to provide pregnant employees and job applicants with protections similar to those afforded under the Americans with Disabilities Act.
 - Applies to public and private sector employers with at least 15 employees.
 - Employers must provide a reasonable accommodation unless doing so would cause an undue hardship.
 - Employers cannot require employees to take a leave of absence as an accommodation if another reasonable accommodation can be provided.
 - Effective June 27, 2023

Rights of Nursing Mothers



- The PUMP Act took effect December 29, 2022.
- FLSA-covered employers are required to provide all employees with reasonable break time and private space, other than a restroom, in which to pump breastmilk during the workday.
 - Must be considered paid working time if the employee is not completely relieved of duties.
 - Employers with fewer than 50 employees need not comply with the PUMP Act where doing so would create an undue hardship.
- The PUMP Act does not preempt state or local obligations related to pregnant and nursing employees. Both New York State and City law include robust protections for nursing and pregnant employees.

Disability-related Accommodations



- Federal, state and local accommodation requirements may apply.
 - Employers should be aware that accommodation obligations are greater under New York State and New York City law as compared to the Americans with Disabilities Act.
 - New York City has a “Cooperative Dialogue” requirement.
- Title III/Public Accommodations
 - Title III prohibits discrimination on the basis of disability in the activities of places of public accommodations (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards.
- Accessibility Issues
 - Requirements apply to brick-and-mortar locations as well as webpages and the Internet.
 - Serial plaintiffs file claims against employers across the country, often with no intention of applying for employment or utilizing specific services.

Sexual Harassment Prevention Requirements



- Under a law that went into effect on October 9, 2018, employers in New York State are required to either implement written sexual harassment prevention policies that meet or exceed the minimum standards set forth in Section 201-g of the New York Labor Law or adopt the model policy published by the NYSDOL.
 - Employers are also required to provide annual sexual harassment prevention training to all NY employees that meet or exceed certain standards established by law and regulation.
- New York State maintains a helpful website that contains relevant training and presentation materials.

Updated Sexual Harassment Prevention Requirements



- On April 11, 2023, the NY Department of Labor finalized updates to its “Sexual Harassment Model Policy.”
 - The DOL also released an updated training video and new model training presentation slides that incorporate the new additions.
- Updates include additional examples of harassment that illustrate how issues can occur with employees working remotely or on virtual platforms, and an emphasis on the fact that gender-based harassment and discrimination can include conduct beyond sexual contact or sexually suggestive conduct, including by singling out employees who identify as cisgender, transgender, or nonbinary.
 - Employers should review and update policies to ensure they meet the new minimum standards established in the updated model policy.

Sexual Harassment Hotline



- In March 2022, Governor Kathy Hochul signed legislation directing the NYSDHR to implement a toll-free confidential hotline to provide counsel and assistance to individuals experiencing workplace sexual harassment.
- Employees and students can call the DHR's toll-free sexual harassment hotline at 1-800-HARASS-3.
 - The NY Human Rights Law was amended in 2019 to allow students to bring claims against public school districts and BOCES.
- All sexual harassment materials, including employee handbooks, policies, and other postings provided to employees, must be updated to include information about the hotline (the model policy includes this information).

Changes in the Standard for Actionable Harassment under NYS Law



- The federal standard for actionable harassment is “severe and pervasive” under Title VII.
 - This applies to all claims of harassment, including but not limited to, sexual harassment.
- Under New York law, harassment does **not** have to be severe or pervasive to be unlawful.
 - Any harassing conduct can be unlawful if it rises above “petty slights or trivial inconveniences.”
 - The new standard applies to claims before the NYSDHR, as well as those filed in court under state law.
 - This standard is still being fleshed out, but cases from NYC *may* provide some context.

Gender Identity or Expression



- In January 2019, the New York Human Rights Law was amended to explicitly include “gender identity or expression” as a protected class. This means a school cannot:
 - condition an individual’s use of their self-identified name on obtaining a court-ordered name change or otherwise require proof of identification with that name; or
 - deliberately disclose a person’s transgender, gender non-conforming or intersex status, or their gender dysphoria without consent.
- Gender identity or expression is defined as “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”
- This protection was most **recently extended to interns** with amendments to section 296-c of the New York Human Rights Law.



PROCEDURAL ISSUES AND UPDATES AT THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

New York State Division of Human Rights



- The New York State Division of Human Rights is dedicated to eliminating discrimination, remedying injustice, and promoting equal opportunity, access, and dignity through enforcement of the Human Rights Law.
- It accomplishes its mission by:
 - Investigating, prosecuting and adjudicating discrimination cases;
 - Educating the public about their rights and responsibilities;
 - Proposing policy and legislation; and
 - Building community.
- Due to recent amendments and changes in law and the NYSDHR's enforcement position **it has become significantly more difficult to defend claims brought at the NYSDHR.**

Protected Classes under the New York Human Rights Law



- Race
- Creed
- Color
- National origin
- Sexual orientation
- Military status
- Sex
- Age
- Marital status
- Citizenship and Immigration Status
- Domestic violence victim status
- Disability
- Pregnancy-related condition
- Predisposing genetic characteristics
- Prior arrest or conviction record
- Gender Identity or Expression
- Familial status
- Retaliation for opposing unlawful discriminatory practices

Expanded Statute of Limitations to Bring Claims Before the NYSDHR



- On November 17, 2023, Governor Hochul signed into law a bill that extends the statute of limitations for filing a discrimination claim with the NYSDHR from one to three years.
 - Previously, aggrieved students/employees had one year to file a discrimination claim with the NYSDHR, except for claims alleging sexual harassment, which were subject to a three-year limitations period.
 - The new limitations period is effective February 15, 2024.

New Hires at the NYSDHR



- The local region of the NYSDHR appears to be hiring additional representatives at a rapid pace.
- The hiring spree appears to be focused primarily on temporary help and Human Rights Specialists.
 - Human Rights Specialists are the first line investigators who are responsible for the initial investigation of claims received by the Division.
 - They are subject to oversight at various steps throughout the investigatory process.
- Care should be taken when dealing with inexperienced investigators as they have considerable discretion throughout the investigatory process and may not have experience dealing with investigations, discrimination claims, or both.

Procedural Steps of a NYSDHR Complaint



- The first step is the filing of the complaint. Filing a complaint is free of charge and the person filing the complaint does not need an attorney.
- The second step is notifying the respondent(s).
- Next, the NYSDHR will resolve any questionable issues of jurisdiction.
- If applicable, a copy of the complaint will be forwarded to the EEOC.
- Then, an investigation will be conducted using methods like written inquiry, field investigation, and investigatory conference(s).
- Lastly, a determination is issued. The Regional Director will make a determination as to whether there is probable cause to believe that discrimination occurred.
- The NYSDHR indicates that in most cases the investigation will be completed within 180 days. As we will discuss later in the presentation, that is not our experience.
- If probable cause is found, the matter will proceed to a hearing before an administrative law judge.

Conciliation



- We have observed an increase in the use of the NYSDHR's conciliation process since the pandemic.
 - This may be an attempt to resolve the backlog of cases and improve the time it takes for the NYSDHR to resolve claims.
- NYSDHR Rule of Procedure 465.7 governs the conciliation process and give the NYSDHR the discretion "at any time after the filing of the complaint, [to] endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion."
 - The process is voluntary and generally non-binding
 - But, in limited circumstances, the NYSDHR has the authority to compel a complainant to accept an offer of conciliation that is "substantial enough to require a determination, in the public interest, to terminate the proceeding . . ."

Two-Party Conferences



- In the past six to twelve months, we have noticed a significant increase in the use of two-party conferences during the investigation stage of a complaint.
 - Two-party conferences were frequently used in other regions in New York but were not often used locally (in our experience).
- Two-party conferences are conducted by the investigator assigned to the case. The complainant and employer (or designated representatives of the employer) are required to participate and will be subject to questioning by the investigator.
 - Prior to the conference, the employer is often required to produce documentation in support of its position and defenses.
 - Counsel for the employer may participate, but the role of counsel is limited.

Public Hearing



- If there is a determination of probable cause, the case is forwarded for a public hearing before an Administrative Law Judge (“ALJ”).
- At the public hearing, testimony is taken under oath, witnesses are subject to cross-examination, and a full record is made.
- Complainants may be represented by their own attorney, or a Division attorney will be appointed to present the case in support of the complainant.
- Following the hearing, the ALJ submits a Recommended Order for the Commissioner’s consideration.
- The Commission will then issue a Final Order either finding discrimination or dismissing the Complaint.
- Hearings have been conducted remotely since the pandemic. This may be a permanent development.

Possible Remedies



- Reinstatement with back pay;
- Compensation for mental anguish;
- An order to cease the discriminatory policies;
- A requirement that training be conducted;
- Civil fines and penalties;
- Punitive damages; and
- Attorneys' fees.



U.S. Equal Employment Opportunity Commission Procedures

U.S. Equal Employment Opportunity Commission



- The U.S. Equal Employment Opportunity Commission (the “EEOC”) has the authority to investigate charges of discrimination against employers who are covered by specific federal laws.
- Statutes include:
 - Title VII of the Civil Rights Act of 1964
 - The Pregnancy Discrimination Act
 - The Equal Pay Act of 1963
 - The Age Discrimination in Employment Act of 1967
 - The Americans with Disabilities Act of 1990
 - The Civil Rights Act of 1991
 - The Rehabilitation Act of 1973
 - The Genetic Information Nondiscrimination Act of 2008

Protected Classes over which the EEOC has Jurisdiction



- The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's:
 - Race;
 - Color;
 - Religion;
 - Sex (including pregnancy and related conditions, gender identity, and sexual orientation);
 - National Origin;
 - Age (40 or older);
 - Disability; or
 - Genetic Information.

Procedures at the EEOC



- The EEOC's role in an investigation is to assess the allegations in the charge and then make a finding.
- If it finds that discrimination has occurred, it will try to settle the charge.
- If it is not successful, it has the authority to file a lawsuit to protect the rights of individuals and the interests of the public and litigate a small percentage of these cases.
- It also works to prevent discrimination before it occurs through outreach, education, and technical assistance programs.

Claim Processing at the EEOC



- The local office of the EEOC has been overwhelmed with cases.
 - As a result, the local office has begun to transfer some local cases to other offices.
- If a claim in which you are involved is transferred from the local office, that development is not intended to be a positive or negative sign regarding the merits of the claim or the disposition of the case.
 - It is merely a time saving measure to spread work throughout the available offices.



**SETTLEMENT CONSIDERATIONS TO BE
AWARE OF DUE TO RECENT CHANGES
IN LAW AND/OR ADMINISTRATIVE
ENFORCEMENT POSITIONS**

NYSDHR Private Settlements



- Private settlements **after a finding of probable cause** will not be accepted for cases filed after October 12, 2021. If you reach a settlement, you must use the Division's Stipulation of Settlement (or, at a minimum, negotiate with the Division concerning any potential changes). The language contained in the Division's Stipulation of Settlement has been approved by the Commissioner and generally must be strictly followed by the parties.
- After a probable cause determination, a complainant's attorney will be required to state in writing why they are seeking a discontinuance and, if the reason is private settlement, the discontinuance will not be granted. Parties will be encouraged to either settle the matter through an order after stipulation that indicates the terms of the settlement or to proceed through the agency's public hearing process.
 - The Division will continue to allow voluntary dismissals on the basis of settlement prior to a finding of probable cause—at least where the complainant is represented by private counsel.
- Information regarding private settlements can be found on the Division's website: <https://dhr.ny.gov/law-2021>

EEOC Private Settlements



- There are also rules about settlements that the EEOC follows that are outlined in the Regional Attorneys' Manual <https://www.eeoc.gov/regional-attorneys-manual>
- These are found under the header "Settlement Standards and Procedures" <https://www.eeoc.gov/regional-attorneys-manual/settlement-standards-and-procedures#section3d>
- Depending on the procedural status of the case at the time settlement is contemplated, the EEOC may question provisions related to confidentiality. No rehire clauses and reversion clauses are prohibited.

New York General Obligations Law Restrictions on Settlement



- Since July 2018, New York law has prohibited the use of non-disclosure provisions in agreements to settle sexual harassment claims “unless the condition of confidentiality is the complainant’s preference.”
- This was subsequently expanded to cover all claims of discrimination and harassment.
- Effective November 17, 2023, the law was again amended to further restrict the use of non-disclosure or confidentiality provisions in settlements agreements. For example, the requirement now applies to:
 - retaliation as well as discrimination claims;
 - independent contractors, in addition to employees and applicants.

New York General Obligations Law Restrictions on Settlement



- The amendments to NY law also provide that a release of claims in an agreement to settle a discrimination, harassment or retaliation claim will be **unenforceable** if it:
 - Requires the complainant to pay liquidated damages for violating a non-disclosure or non-disparagement clause;
 - Requires the complainant to repay or forfeit any consideration for violating a non-disclosure or non-disparagement clause; or
 - Contains any affirmative statement that the complainant was not, in fact, subject to unlawful discrimination, harassment, or retaliation.
- Form language in settlement agreements should be reviewed to ensure that all agreements are in compliance with the amended law.

Impact of the Limitations on Private Settlements



- What is the impact of the limitations on private settlement at the NYSDHR?
- What is the impact of the limitations on private settlement at the EEOC?



Questions?



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