

NEW YORK STATE LEGISLATURE PASSES BROAD OVERHAUL OF WORKPLACE HARASSMENT & DISCRIMINATION PROTECTIONS

Hodgson Russ Labor & Employment Alert
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On the heels of last year's expansive legislative action directed at sexual harassment, the New York State Legislature has passed an even broader overhaul of the protections governing workplace harassment and discrimination. Although this bill has not yet been signed by Governor Cuomo, he is widely expected to do so soon. This bill, once it becomes law, will have serious repercussions for every employer in New York State.

The bill includes the following key provisions:

Lowers the Standard for Proving Discriminatory Harassment

Currently, harassment must be "severe or pervasive" to be actionable. The bill eliminates the "severe or pervasive" standard in favor of a less stringent standard: whether the conduct subjects an individual to "inferior terms, conditions or privileges of employment" based on his or her membership in a protected class.

This change will go into effect 60 days after the bill is signed into law.

Undermines the Internal Complaint Mechanism

Under the *Faragher-Ellerth* defense, an employer can defeat a harassment claim if (i) it attempted to prevent and correct the harassing conduct through, among other things, an effective internal complaint procedure; and (ii) the employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer. This bill includes a provision which states that the fact that an employee did not make an internal complaint about the harassment "shall not be determinative" of whether the employer is liable. The bill instead adds a narrow affirmative defense for employers that applies only if they can establish that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."

This change will go into effect 60 days after the bill is signed into law.

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Punitive Damages and Attorneys' Fees Are Recoverable

The bill will allow successful complainants to recover uncapped punitive damages from any private employer, but not the State or other public employers. Unlike the New York City Human Rights Law, the New York State Human Rights Law (NYSHRL) currently does not allow the recovery of punitive damages. Also, under the bill, an employee who prevails on any employment discrimination claim must be awarded attorneys' fees. Currently, attorneys' fees are available only for claims of sex discrimination, and even then they are discretionary. And while a prevailing employer may recover its attorneys' fees from an employee, an employer must first establish that the employee's case was "frivolous," which is a high standard.

This change will go into effect 60 days after the bill is signed into law.

New Distribution Requirement for Sexual Harassment Policies and Training Materials

The bill requires that after each mandatory sexual harassment training, an employer must provide each employee with a copy of its sexual harassment policy and the information presented at the training in English *and* the primary language of the employee, provided that the State publishes translations of these documents in that primary language. So, like the New York Wage Theft Prevention Act's requirement that written wage notices be provided in English and the primary language of each employee, many employers will have to provide some employees with additional documents in a language other than English. For employers that do not use the State's model sexual harassment policy and training material, this means that they will need to obtain a translation of these materials for certain employees who identify a primary language other than English.

This change will take effect immediately after the bill is signed into law.

Extension of Protection to all Forms of Discriminatory Harassment

The bill adds a provision which expressly identifies harassment based on any of the characteristics otherwise protected by the NYSHRL as an unlawful discriminatory practice. The bill also makes it illegal to subject any individual to harassment because he or she opposed a practice forbidden under the law, or because they have filed a complaint, or testified or assisted in any proceeding under the law.

This change will go into effect 60 days after the bill is signed into law.

Extension of Statute of Limitations

Under current state law, a complainant must file a NYSHRL claim for sexual harassment with the Division of Human Rights within one year of the alleged unlawful discriminatory practice, but has three years to file in court. Under the bill, a sexual harassment complainant will have three years to file directly with the Division.

This change will take effect one year after the bill is signed into law.

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New Restrictions on Non-Disclosure Agreements

Last year, a restriction prohibiting the inclusion of non-disclosure clauses in the settlement of sexual harassment claims was implemented. This provision limited the disclosure of the underlying facts and circumstances of the claim, unless the complainant's preference was to include a confidentiality provision. The bill expands this prohibition to cover all types of discrimination claims. Further, any nondisclosure provision must be provided in writing in "plain" English *and* the primary language of the complainant.

The bill also explicitly provides that any non-disclosure agreement is void to the extent that it restricts a complainant from initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by an appropriate federal, state, or local agency, or filing or disclosing any facts necessary to receive unemployment benefits, Medicaid, or other public benefits.

These changes will take effect 60 days after the bill is signed into law.

Also, for agreements entered into on or after January 1, 2020, they may not contain any provision which prevents the disclosure of factual information related to any future claim of discrimination, unless the provision notifies the employee or applicant that he or she is not prohibited from speaking with law enforcement, the EEOC, the Division of Human Rights, a local human rights commission, or the employee's or applicant's attorney.

Prohibition on Mandatory Arbitration of All Discrimination Claims

Last year's extension of the law prohibiting mandatory arbitration of sexual harassment claims has been extended to cover claims involving any type of discrimination. Federal law, however, could preempt this extension given the Supreme Court's recent decisions which have been supportive of arbitration agreements. But this issue will likely need to be resolved by the courts, at least one of which has recently indicated that this provision may be preempted by federal law.

This change will go into effect 60 days after the bill is signed into law.

Expansion of the Definition of Covered Employers

Currently, the NYSHRL applies only to employers with four or more employees, except with respect to sexual harassment protections and domestic workers. The bill modifies the definition of employer to cover all employers within the State of New York, regardless of size.

This change will go into effect 180 days after the bill is signed into law.

Broader Protections for Non-Employees and Domestic Workers

Unlawful discriminatory practices relating to domestic workers will now include all claims of harassment based on any characteristic otherwise protected under the NYSHRL. The bill also extends the state's new anti-harassment laws to non-employees, including any contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, or the employees of any of the foregoing. This provision previously applied only with respect to sexual harassment claims of non-employees, but will now cover all forms of harassment.

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This change will go into effect 60 days after the bill is signed into law.

Liberal Construction of Law Decoupled from Federal Civil Rights Laws

The bill requires the NYSHRL to be construed liberally and without regard to similarly worded provisions under the federal civil rights laws (e.g., Title VII, the ADA, the ADEA, etc.). In addition, the bill adds a new mandate requiring exceptions and exemptions from the NYSHRL to be construed narrowly to maximize deterrence of discriminatory conduct. This new construction will require courts to analyze harassment claims separately under federal, state, and local civil rights laws, and are expected to lead to considerably more employee-friendly interpretations of the law.

This change will take effect immediately after the bill is signed into law.

Conclusion

These sweeping changes to New York law may lead to a significant uptick in workplace harassment claims and make it significantly more difficult to successfully defend against them once filed. And given the specter of uncapped punitive damages, this bill will likely increase the pressure on many employers to settle claims, even those of borderline or limited merit, rather than risk proceeding to trial. If signed by the Governor, New York employers should prepare to review and significantly revise their existing policies, training materials and procedures, non-disclosure agreements, and possibly their arbitration agreements, as well as their general human resource practices, to ensure they are compliant with these significantly heightened requirements.

If you have any questions regarding this new legislation or its impact on employers, please contact one of our Labor and Employment attorneys.

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