NYS GOVERNOR SIGNS BILL GOVERNING WORKPLACE HARASSMENT & DISCRIMINATION PROTECTIONS

Hodgson Russ Labor & Employment Alert
August 16, 2019

As advised in our client alert on July 2, 2019, the New York State Legislature has passed a broad overhaul of the protections governing workplace harassment and discrimination. Governor Cuomo signed the bill into law on Monday, August 12, 2019.

The law includes the following key provisions:

Lowers the Standard for Proving Discriminatory Harassment

Currently, the longstanding precedent has been for courts to apply the federal standard to state harassment claims. The federal standard requires the alleged harassment to be "severe or pervasive." The new law eliminates the "severe or pervasive" standard in favor of a less stringent standard for state harassment claims: whether the conduct subjects an individual to "inferior terms, conditions or privileges of employment" based on his or her membership in a protected class. Employers will need to ensure that their policies and trainings are consistent with this new standard.

This change goes into effect on October 11, 2019.

Undermines the Internal Complaint Mechanism

Under the longstanding *Faragher-Ellerth* defense, an employer could defeat a harassment claim if (i) it attempted to prevent and correct the harassing conduct and had an internal complaint procedure; and (ii) the employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer. The new law provides that an employee's failure to make a complaint about the harassment to the employer "shall not be determinative" of whether the employer is liable. The law instead adds a narrow affirmative defense if the employer 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."

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Punitive Damages and Attorneys' Fees Are Recoverable

The new law allows successful complainants to recover uncapped punitive damages from private employers, but not the State or other public employers. The law also provides that attorneys' fees **must** be awarded to any prevailing complainant on an employment discrimination claim. This is a major departure from the prior law, under which attorneys' fees were discretionary and only available in claims of sex discrimination.

As under the prior law, a prevailing employer may recover attorneys' fees from a complainant only if it can establish that the complainant's case was "frivolous".

This change goes into effect on October 11, 2019.

New Distribution Requirement for Sexual Harassment Policies and Training Materials

The law requires that after each mandatory annual sexual harassment training, the employer must provide employees with a copy of its sexual harassment policy and the information presented at the training in English *and* the primary language of each employee if the State publishes translations of its model policy and training documents in that language. As a practical matter, employers that do not use the State's model sexual harassment policy will need to obtain a translation of their policy and training.

This change became effective immediately on August 12, 2019.

Extension of Protection to all Forms of Discriminatory Harassment

The law adds a provision that explicitly identifies harassment based on any of the protected classes protected by the New York State Human Rights Law (NYSHRL) as an unlawful discriminatory practice under the law. The law also makes it illegal to subject any individual to harassment because he or she opposed a practice forbidden under the law, or because he or she filed a complaint, or testified or assisted in any proceeding under the law.

This change goes into effect on October 11, 2019.

Extension of the Statute of Limitations

A complainant may file a claim for sexual harassment with the Division of Human Rights within three years of the alleged unlawful discriminatory practice. Before, a complainant was required to file within one year of the alleged unlawful discriminatory practice.

This change goes into effect on August 12, 2020.

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. Now the law 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.

Moreover, under the new law, 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.

This change goes into effect on October 11, 2019.

Also, for agreements entered into on or after January 1, 2020, the document 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 his or her attorney.

Prohibition on Mandatory Arbitration of All Discrimination Claims

Last year's law prohibiting mandatory arbitration of sexual harassment claims has been extended to cover claims involving any type of discrimination. Federal law could preempt this extension given the Supreme Court's recent arbitration decisions, but this issue will likely need to be resolved by the courts.

This change goes into effect on October 11, 2019.

Expansion of the Definition of Covered Employers

The new law modifies the definition of employer to cover all employers within the State of New York, regardless of size. Accordingly, employers with less than four employees will no longer be able to defend a claim by stating that they are not subject to the NYSHRL.

This change goes into effect February 8, 2020.

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 protected class. The law 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 their employees. This provision previously applied only with respect to sexual harassment claims of non-employees, but will now cover all forms of unlawful harassment.

This change goes into effect on October 11, 2019.

Liberal Construction of the Law Decoupled from Federal Civil Rights Laws

The law requires the NYSHRL to be construed liberally and without regard to similarly worded provisions under the federal civil rights laws. In addition, the law 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.

This change became effective immediately on August 12, 2019.

This law may result in a significant increase in workplace harassment claims. Especially given the lowered threshold for proof by a complainant/plaintiff, the weakening of the *Faragher-Ellerth* defense, and the extension of the statute of limitations, these cases will become much more difficult to defend. The hurdles to an effective defense coupled with the specter of uncapped punitive damages will likely increase the pressure on many employers to settle claims rather than proceeding to trial.

New York employers should immediately review their existing policies, training materials, non-disclosure agreements, and arbitration agreements, as well as their general human resource practices, to ensure they are compliant with the new law.

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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