

Client Alert



A report for clients and
friends of the Firm

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New York State Human Rights Law Amended To Provide Civil Penalties and More Changes Proposed

On April 7, 2009, Governor Paterson signed legislation authorizing the imposition of civil penalties against employers and individuals found to have committed discriminatory practices under the New York Human Rights Law (the law is scheduled to take effect on July 6, 2009). Such penalties may be as much as \$50,000 or even higher if maliciousness is proven. Standards from the New York State Division of Human Rights are forthcoming. Additionally, legislation is now pending in the New York Legislature, which, if passed, would allow for the recovery of punitive damages and attorneys' fees in connection with claims against employers under the New York State Human Rights Law ("NYSHRL").

The New York State Human Rights Law

The New York State Human Rights Law prohibits, among other things, discriminatory employment practices based upon age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposed genetic characteristics, and marital status. Employees filing discrimination claims under the State law, presently, can obtain two types of recovery: "affirmative action" from the employer (such as hiring, upgrading, promotion, or reinstatement to a position with or without back pay); and compensatory damages (e.g., economic damages and emotional distress damages).

With the passage of the recent Budget Bill, effective July 6, 2009, civil penalties also may be imposed against employers found to have violated the

NYSHRL, whether through an administrative charge or court proceeding. Prior to this amendment, civil penalties under the NYSHRL were only available in housing discrimination claims.

While punitive damages and attorneys' fees are not currently available in employment discrimination claims, employers also should be aware that *proposed legislation* is pending in the New York State Legislature that would allow individuals to recover punitive damages and reasonable attorneys' fees for NYSHRL violations. This legislation, if passed, would give plaintiffs in employment discrimination cases the same remedies and relief available to those in housing discrimination cases brought under the NYSHRL.

Civil Penalties Provision

Effective July 6, 2009, the maximum civil penalty is \$50,000, unless the discrimination is shown to be malicious, in which case the maximum penalty is \$100,000. Any civil penalties collected will go into the State's General Fund. The 2009-2010 Executive Budget estimates that these civil penalties will generate approximately \$125,000 to \$156,000 during the 2009-2010 fiscal year.

While one purpose of the civil penalty provision is to generate income for the State, generally the underlying rationale for the imposition of civil penalties on employers is to provide increased deterrence against discriminatory employment practices.

Because the change in the law was made through the budget bill, there is no articulated standard for determining the amount of the penalty. However, the New York State Division of Human Rights is developing guidelines that should describe the standards that will be applied when civil penalties are considered for imposition on employers. We anticipate that the existing civil penalty standards in the housing discrimination provisions of the State Human Rights Law will be relevant to those adopted in the employment context. Thus, Section 297(4)(c)(vi) of the NYSHRL permits the State Division of Human Rights

to assess civil penalties against persons or entities found to have committed housing discrimination and consider several factors in its determination, including: the nature and circumstances of the violation; whether the respondent had previously been found to have committed unlawful discrimination; respondent's financial resources; and the degree of the respondent's culpability in light of the goal of deterrence.

It is also possible that the New York State Division of Human Rights will look to the civil penalty standards under the New York City Human Rights Law. Thus, pursuant to Section 13 of that law, employers can mitigate and reduce the civil penalties ultimately imposed where liability of an employer has been established by proving that, prior to the conduct for which the employer is being found liable, the employer had: 1) established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees; and 2) a record of no, or relatively few, prior incidents of discriminatory conduct. Several factors are considered under the City law to determine if an employer had effective policies for the prevention and detection of unlawful discriminatory practices, including whether the employer had: strong policies against such practices; effectively communicated those policies to employees; meaningful procedures for responding to and investigating the complaints of employees; procedures for taking prompt and appropriate remedial action in the face of discriminatory conduct; a program to educate employees about unlawful discriminatory practices under local, state, and federal law; and/or procedures for the supervision of employees that are specifically directed at the prevention and detection of discriminatory practices.

Proskauer is monitoring the development of standards for the new civil penalty provision of the State law and will keep our clients and friends up-to-date on this subject.

Pending Legislation Would Allow Recovery of Punitive Damages and Reasonable Attorneys' Fees

As mentioned earlier, bills are pending in both branches of the New York Legislature proposing to add two new remedies under the NYSHRL – punitive damages and recovery of reasonable attorneys' fees. The stated legislative intent for these proposed amendments is additional deterrence against discriminatory employment practices and to increase the remedies available to victims of discrimination. If enacted, plaintiffs in employment cases would have the same remedies as those in housing discrimination cases under the State law.

Punitive damages with caps and attorneys' fees, are already available under the federal anti-discrimination laws as well as under the New York City Human Rights Act, where such

damages are uncapped. Thus, the proposed change would bring the State law more in line with federal and local law.

Proskauer's Employment Law Counseling & Training Practice Group is monitoring the progress of the proposed legislation and will follow-up with any new developments.

Conclusion

As civil monetary penalties have been added to the arsenal of remedies under the NYSHRL, and as proposals for punitive damages and attorneys' fees are on the horizon, New York employers are reminded of the recent legislative activity concerning the importance of having in place effective human resources policies that prevent, detect, and address unlawful discrimination. Policies should clearly prohibit discriminatory conduct, and employers should have in place, and remind employees annually of, such policies, as well as the internal complaint procedures established to address potential discriminatory conduct.

Particularly in light of the developments described herein, as well as recent decisions broadly interpreting the New York City Human Rights Law, it is important for employers to provide training – to employees at all levels – such training should cover local, state, and federal anti-discrimination laws, types of unlawful practices prohibited under these laws, conduct that might contribute to or result in a violation of the laws, the policies of the employer prohibiting such conduct, and the remedial policies and procedures that the employer has in place to receive and address employee complaints of discriminatory conduct.

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