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New York State Set to Further Expand Protections Against Workplace Harassment

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New York State lawmakers have approved broad legislation that will lower the burden on plaintiffs seeking to prove claims of workplace harassment under the New York State Human Rights Law (NYSHRL), as well as extend the statute of limitations and expand potential damages for such claims. The bill also expands coverage under the NYSHRL and broadens existing limitations on nondisclosure agreements and mandatory arbitration clauses.

This sweeping bill represents the latest effort by the State legislature and Governor Andrew Cuomo—who is expected to sign the bill —to increase the protections for employees asserting claims of workplace discrimination and harassment. Broadly speaking, the new bill expands the protections implemented last year for victims of sexual harassment to employees asserting claims of discrimination generally, and brings the State law in line with, and in some cases beyond, the protections accorded to employees under the New York City Human Rights Law.

Lowered Burdens for Bringing Harassment Claims

Presently under the NYSHRL (as is the case under federal anti-discrimination law), a complainant must show that the alleged sexual or other form of workplace harassment was "severe or pervasive" in order to succeed on their claim. The newly passed bill would eliminate this requirement under the NYSHRL, such that claims of harassment could be asserted so long as the employee can show that they were subjected to "inferior terms, conditions or privileges of employment because of the individual's membership in one or more of [the] protected categories [in New York State]." Notably, employees would not have to demonstrate the existence of a comparator—i.e., someone who is outside of their protected category who was treated more favorably—in order to prevail on a harassment claim. However, the bill provides that it would be an affirmative defense under the NYSHRL for an employer to show that the harassing conduct does not rise above the level of what a reasonable person of the same protected category would consider "petty slights or trivial inconveniences," which is the same standard adopted by certain state courts with regard to harassment claims under the NYCHRL.

The bill also would eliminate the applicability of the *Faragher-Ellerth* defense to claims under the NYSHRL. This defense was established by the U.S. Supreme Court over twenty years ago and provides an affirmative defense for employers to harassment claims where an employee unreasonably failed to take advantage of the employer's internal complaint mechanisms. While the defense would still be available in response to federal discrimination claims, employers would not be able to raise the same defense to NYSHRL claims, even if employees asserting such claims failed to follow their employer's policy for complaining about the harassment.

Extended Statute of Limitations and Expanded Damages

Individuals would now have three years to report claims of workplace discrimination or harassment to the State Division of Human Rights, rather than the current one year limitation on reporting. In addition, the statute of limitations for certain criminal sexual acts and related civil claims would also be extended.

The bill also would permit the award of uncapped punitive damages and require the award of reasonable attorney's fees in cases of employment discrimination by private employers under the NYSHRL. Currently under the law, punitive damages and attorney's fees are only available in housing discrimination cases, and the decision to award attorney's fees is in the court's discretion.

Broader Coverage of Employees and Non-Employees

The bill would expand the definition of a covered employer under the NYSHRL to include all employers within the state, regardless of size. Previously, the law only applied to employers with four or more employees, except with regard to protections against sexual harassment, which applied to employers of all sizes.

The bill also would extend protections against discrimination on the basis of any protected category under the NYSHRL to certain "non-employees," including contractors, subcontractors, vendors, consultants, or other persons providing services pursuant to a contract. As we previously reported, protections against sexual harassment under the NYSHRL already have been extended to such non-employees.

Expanded Limitations on Nondisclosure Provisions

The new bill would bar nondisclosure provisions in any settlement, agreement or other resolution of any claim, the factual foundation of which involves discrimination on the basis of *any protected class*, unless the condition of confidentiality is the preference of the complainant. As we previously reported, since July 11, 2018, employers have been prohibited from including confidentiality clauses pertaining to claims of sexual harassment unless they are the preference of the complainant. The expanded law extends the limitation on an employer's ability to obtain confidentiality beyond sexual harassment claims to any claim involving discrimination "in violation of the laws prohibiting discrimination, including but not limited to [the NYSHRL]."

In order to be deemed the "preference of the complainant," any term or condition regarding nondisclosure would need to be provided in writing to all parties "in plain English" and, if applicable, the primary language of the complainant. Further, as is presently required for confidentiality clauses involving claims of sexual harassment, the complainant would need to be provided with 21 days to consider the nondisclosure term or condition and, if after 21 days the term or condition is the complainant's preference, it would need to be memorialized in an agreement signed by all parties, following which the complainant would have seven days to revoke their signature.

The bill also provides that any provision in a contract or other agreement entered into on or after January 1, 2020 that prevents the disclosure of factual information related to any future claim of discrimination would be void and unenforceable unless the provision notifies the employee or applicant that it does not prohibit them from speaking with law enforcement, the Equal Employment Opportunity Commission, the state Division of Human Rights, a local commission on human rights or an attorney retained by the employee or applicant.

Expanded Prohibitions on Mandatory Arbitration

The bill also would expand the recently enacted prohibition on mandatory arbitration of sexual harassment claims to prohibit employers from requiring employees, as a condition of employment, to arbitrate claims of discrimination on the basis of *any protected class.* Significantly, however, as is the case with the current prohibition involving sexual harassment claims, the expanded prohibition would apply only to the extent it is not inconsistent with federal law. As many commentators noted following the enactment of the existing restrictions, it appears that such limitations on arbitration would be preempted by the Federal Arbitration Act in cases where both laws would apply. However, there is no authority yet expressly deciding that question.

Notice Requirements

Under the bill, every employer would be required to provide employees, both at the time of hire and at every annual sexual harassment prevention training, a notice containing the employer's sexual harassment prevention policy and "the information presented at the employer's training program." The State labor commissioner would be tasked with preparing templates that may be used by employers to satisfy this requirement.

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If signed by Governor Cuomo (as is anticipated), the law will generally take effect sixty days after it is enacted; the provisions expanding the definition of employer and statute of limitations will take effect 180 days and one year after enactment, respectfully.

We will continue to monitor this significant bill and report on any further developments

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