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New York State Significantly Expands Workplace Anti-Discrimination Protections

Law and the Workplace on **August 12, 2019**

On August 12, 2019, Governor Andrew Cuomo signed into law significant expansions to workplace anti-discrimination protections in New York State.

As we previously reported in detail, the new legislation includes numerous measures regarding discrimination and harassment in all forms (not just sexual harassment) in the workplace. The signing of the bill triggers the countdown to the effective dates of the following provisions:

Effective Immediately

- New York employers will be required to provide employees, both at the time of hire and at every annual sexual harassment prevention training, with a **notice containing the employer's sexual harassment prevention policy** and "the information presented at the employer's training program."

Effective October 11, 2019

- A complainant will **no longer need to show that alleged sexual or other workplace harassment is "severe or pervasive"** in order to succeed on their claim under the New York State Human Rights Law ("NYSHRL"), but rather need only 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]." However, it will be an affirmative defense for an employer to show that the conduct does not rise above the level of "petty slights or trivial inconveniences."
- The ***Faragher-Ellerth*** **defense will no longer apply to discrimination claims under the NYSHRL.** This affirmative defense applies where an employee unreasonably fails to take advantage of an employer's internal complaint mechanisms with regard to the claims at issue. While the defense would still be available in response to federal discrimination claims, employers will not be able to raise the same defense to NYSHRL claims.

- The new law will **extend protections against discrimination on the basis of any protected category under the NYSHRL (not just sexual harassment, as is presently the case) to certain "non-employees"** including contractors, subcontractors, vendors, consultants, or other persons providing services pursuant to a contract.
- Employers will be **prohibited from including nondisclosure provisions in any agreement or other resolution of a claim involving any allegations of unlawful discrimination**, unless it is the preference of the complainant to do so**.** In other words, the same limitations on nondisclosure provisions that presently apply to sexual harassment claims will now be extended to claims of discrimination on the basis of *any protected characteristic*. Similar to the existing sexual harassment nondisclosure requirements, a complainant will need to be provided with 21 days to consider the nondisclosure provision and, if after 21 days the provision is the complainant's preference, it must be memorialized in an agreement signed by all parties, after which the complainant will have seven days to revoke their agreement.
- The **existing prohibition on mandatory pre-suit arbitration of sexual harassment claims will be extended** to any claims of unlawful discrimination.
- However, as is the case with the current prohibition on mandatory arbitration of sexual harassment claims, the expanded prohibition applies only to the extent it is not inconsistent with federal law. Recently, the Southern District of New York held in Latif v. Morgan Stanley Co. (S.D.N.Y. June 26, 2019), that New York's prohibition on mandatory arbitration of sexual harassment claims is preempted by the Federal Arbitration Act in situations where both laws apply. It seems likely that the *Latif* analysis would similarly apply to this latest attempt to restrict mandatory arbitration.
- The new law will **permit the award of uncapped punitive damages as well as reasonable attorney's fees** in cases of employment discrimination under the NYSHRL. Currently, punitive damages and attorney's fees are only available in housing discrimination cases.

Effective January 1, 2020

- Any provision in a contract or other agreement entered into on or after January 1, 2020 that **prevents the disclosure of information related to any future claim of discrimination on the basis of any protected characteristic** will be unenforceable, unless the provision notifies the employee or applicant that it does not prohibit them from speaking with law enforcement, the EEOC, the New York State Division of Human Rights, a local commission on human rights, or an attorney retained by the employee or applicant.

Effective February 8, 2020

- The **definition of a covered employer under the NYSHRL will be expanded** to include all employers within the state, regardless of size. Presently, the law only applies to employers with four or more employees, except with regard to protections against sexual harassment, which applied to employers of all sizes.

Effective August 12, 2020

- Individuals will have **three years to report claims of sexual harassment to the NY State Division of Human Rights**, rather than the current one year limitation on reporting.

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Related Professionals

- **Evandro C. Gigante**
  Partner
- **Laura M. Fant**
  Special Employment Law Counsel
- **Arielle E. Kobetz**
  Associate