Proskauer

Sweeping Expansion of Protections Relating to Workplace Discrimination on the Horizon in New York State

Law and the Workplace Blog on **March 17, 2022**

A suite of bills aimed at further enhancing protections for both employees and independent contractors regarding discrimination, harassment and retaliation in the workplace are on the horizon in New York State. Several of these bills, if ultimately enacted, would potentially lead to a groundbreaking shift in how employers approach settlement of discrimination, harassment and retaliation claims.

The following three bills have already been signed into law:

Prohibition on Retaliatory Release of Personnel Files

S5870 expands the definition of "retaliation" under the New York State Human Rights Law (NYSHRL) to include "disclosing an employee's personnel files because he or she has opposed any practices forbidden under [the NYSHRL] or because he or she has filed a complaint, testified or assisted in any proceeding under [the NYSHRL], except where such disclosure is made in the course of commencing or responding to a complaint in any proceeding under [the NYSHRL] or any other civil or criminal action or other judicial or administrative proceeding as permitted by applicable law." The justification for the new law, according to the sponsor memo, is that "retaliation frequently appears in the form of a leaking of personnel files with the intent to disparage or discredit a victim or witness of discrimination in the workplace."

The bill also provides the state attorney general the power to commence a court action to address actual or pending violations of the NYSHRL anti-retaliation provisions.

S5870 was signed into law by Governor Kathy Hochul on March 16, 2022 and takes effect immediately.

Sexual Harassment Hotline

S812A establishes a toll-free confidential hotline, administered by the New York State Department of Human Rights (NYSDHR), "to provide individuals with complaints of workplace sexual harassment counsel and assistance." The NYSDHR will be required to work with the New York State Department of Labor "to ensure that information on the hotline is included in any materials employers must post or provide to employees regarding sexual harassment."

S812A was signed into law on March 16, 2022 and takes effect 120 days after signing, on July 14, 2022.

Expansion of NYSHRL Protections for Public Employees

S3395a expands the definition of a covered "employer" under the NYSHRL to include the State of New York and all local political subdivisions, including elected officials and members of the judiciary. S3395A was signed into law on March 16, 2022 and takes effect immediately.

* * *

The following bills are currently still pending. They each have been passed by the state Senate and are presently before the Assembly for consideration:

No-Rehire Clauses Prohibited

S766 would prohibit no-rehire clauses in settlement agreements with both employees and individual independent contractors. Specifically, the bill would render the release of any claims (including but not limited to those related to unlawful discrimination or harassment) by an employee or independent contractor "who is a natural person" unenforceable if any provision of the settlement agreement would prohibit a covered individual "from applying for, accepting, or engaging in future employment with such employer, or any entity or entities related to such employer." Further, where a release of claims is rendered unenforceable due to the existence of a prohibited no-rehire clause, the employer would remain bound by all other provisions of the agreement, including the obligation to provide the full consideration to the employee as set forth in the agreement. The bill would not, however, preclude an employee and employer from agreeing to terminate an existing employment relationship as part of a settlement of a claim.

While the EEOC has long disfavored no-rehire clauses in agreements, courts have generally upheld such clauses in the absence of state statutes precluding them. If S766 is enacted, New York would join a small handful of other states – namely California and Vermont – that have statutes prohibiting or limiting the use of no-rehire clauses.

If enacted, S766 would take effect on the 60th day after becoming law and would apply to all agreements entered into on and after such date.

Prohibition on Liquidated Damages or Forfeitures for Breach of Non-Disclosure Provisions

S738 would render the release of any claim, the factual foundation for which involves unlawful discrimination, harassment or retaliation, by an employee or independent contractor unenforceable if, as part of the settlement agreement resolving such claims:

- the complainant is required to pay liquidated damages for violation of a non-disclosure non-disparagement clause; or
- the complainant is required to forfeit all or part of the consideration for the agreement for violation of a non-disclosure or non-disparagement clause.

In addition, the bill would render such a release unenforceable if the settlement agreement resolving the discrimination, harassment or retaliation claim(s) contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, harassment or retaliation.

The bill would also expand the current requirement that any agreement preventing the disclosure of factual information related to any future claim of discrimination not prohibit a complainant from speaking with law enforcement, the EEOC or state or local division of human rights, or an attorney retained by the complainant to also include a prohibition on limiting a complainant's ability to speak with the attorney general. The bill would also expand this reservation of rights requirement to agreements entered into with independent contractors as well as employees.

Finally, the bill would modify the current requirement that a complainant consider any non-disclosure provision(s) of a settlement agreement or resolution of a discrimination claim for a firm 21-day period before such provision is memorialized in an agreement to permit the complainant to agree to the provision prior to the 21-day mark if they wish to do so. The bill would also clarify that the consideration period requirements for non-disclosure provisions would apply to the resolution of not only discrimination claims, but also those involving harassment or retaliation.

S738's provisions prohibiting liquidated damages and rescission of consideration for breaches of non-disclosure and non-disparagement clauses are among the first of their kind in the nation, and if passed into law would significantly alter the landscape for employers (as well as employees) seeking to resolve discrimination, harassment and retaliation claims. Such provisions are commonly included in settlement agreements to provide assurances to the employer that the confidentiality and reputational protections for which they are bargaining (and oftentimes paying significant amounts of money to secure) will be upheld. If such assurances are no longer available, the result may be reduced amounts of consideration being offered to complainants, or perhaps even less inclination for employers to engage in early-stage settlement discussions in the first place – a result that, ironically, would negatively impact the very population the bill purports to be seeking to protect.

If enacted, S738 would take effect immediately and would apply to any agreements entered into on and after such date.

Extended Statutes of Limitation for Filing Administrative Charges and Lawsuits

S566A would extend the statute of limitations for filing administrative charges with the NYSDHR for claims relating to any alleged unlawful discriminatory practice to three years from the current one year. Presently, only claims of sexual harassment are subject to a three year limitation on filing. If enacted, S566A would take effect on the 90th day after becoming law and would apply to all claims arising on or after such date.

S849A would extend the statute of limitations for filing a lawsuit for any unlawful discriminatory practice under the NYSHRL to six years from the current three years. If enacted, S849A would take effect on the 60th day after becoming law.

* * *

We will continue to monitor and report on developments regarding these bills.

View Original

Related Professionals

- **Allan S. Bloom**
  Partner
- **Evandro C. Gigante**
  Partner
- **Laura M. Fant**
  Special Employment Law Counsel