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NY Passes Dramatic Amendments to Workplace Discrimination Laws

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Changes on the horizon will require employers throughout New York State to make significant changes to their workplace discrimination and harassment prevention plans and policies.

A bill passed on June 19 by the State Assembly and Senate offers greater protections to employees from workplace discrimination, including harassment, and makes it much more difficult for employers to defend against such claims. The bill, which Gov. Andrew Cuomo is expected to sign, amends several New York laws including: additional protections for protected classes and special protections for employees who allege they have been sexually harassed; changes to nondisclosure agreements; extension of the statute of limitations for sexual harassment claims; and various changes to statutes governing sexual harassment prevention in the workplace.

Some of the provisions will be effective immediately upon signing. Others will take effect 60 or 180 days after.

Key Provisions of the Bill

The bill contains a plethora of changes relating to workplace sexual harassment and discriminatory harassment based on other protected characteristics under the New York State Human Rights Law (NYSHRL). Specifically, the bill includes the following key provisions:

- **Employers must provide sexual harassment prevention policy in both English and the employee's primary language**

Employers must now provide their sexual harassment policy to employees in English and the employee's primary language at the time of hire and at every annual sexual harassment prevention training. Employers must also provide the training material to employees in English and their primary language.

The bill mandates that the Labor Commissioner prepare model sexual harassment prevention policies and training materials in English and other languages. If the Commissioner does not prepare these documents in a language identified by an employee as his or her primary language, an employer may satisfy its obligations by providing the materials in English.

This provision of the bill takes effect immediately after the bill becomes law.

- **Prohibits agreements barring the disclosure of facts and circumstances of a discrimination claim unless the condition of confidentiality is the employee's preference**

No separation agreement, settlement agreement or other agreement resolving a

claim of discrimination (not just sexual harassment) may include a nondisclosure/confidentiality provision barring the employee from disclosing the underlying facts and circumstances of the claim *unless*:

- The condition of confidentiality is the employee's preference (which must be memorialized in writing);
- The nondisclosure/confidentiality provision is written in English *and* the employee's primary language;
- The employee has 21 days to consider the provision before signing the agreement and, after signing the agreement, has seven (7) days to revoke the agreement; and
- The nondisclosure/confidentiality provision does not preclude the employee from a) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by a local, state or federal agency, or b) filing or disclosing facts necessary to receive unemployment insurance, Medicaid or other public benefits to which the employee is entitled.

Further, on or after January 1, 2020, a contract or other agreement between an employer and employee or potential employee cannot contain a nondisclosure/confidentiality provision barring the employee from disclosing factual information related to a future claim of discrimination (not just sexual harassment) *unless* the nondisclosure/confidentiality provision provides that the employee is not prohibited from speaking with law enforcement, the Equal Employment

Opportunity Commission, the New York State Division of Human Rights, a local commission on human right, or an attorney retained by the employee or potential employee.

This provision of the bill takes effect 60 days after the bill becomes law.

- **Prohibits mandatory arbitration to resolve claims of discrimination**

The bill expands New York law currently prohibiting the inclusion of mandatory arbitration provisions in contracts to resolve sexual harassment claims. Under the bill, any agreement that requires mandatory arbitration of discrimination claims will be unenforceable. Whether the ban on mandatory arbitration of discrimination claims violates the Federal Arbitration Act—which permits such arbitration provisions—will likely be addressed by the judiciary in the near future.

This provision of the bill takes effect 60 days after the bill becomes law.

- **Changes the definition of “employer”**

The bill amends the definition of “employer” to cover all employers within the State of New York, regardless of the number of employees (currently the NYSHRL applies to only employers with four (4) or more employees, except for sexual harassment protections, which apply to all employers in New York). Thus, any New York employee who works for a private employer or a public employer (other than the federal government) will be able to assert a claim of discrimination or harassment based upon on protected characteristic.

The new definition of employer goes into effect 180 days after the bill becomes law.

- **NYSHRL protections extended to all forms of discriminatory harassment (not just sexual harassment) based on all protected classes; eliminates the “severe or pervasive” standard; and eliminates a common employer liability defense**

The bill amends the NYSHRL to prohibit harassment based on all protected classes currently covered by the NYSHRL, as well as harassment because an individual has opposed any practices forbidden under the NYSHRL or because such individual has filed a complaint, testified or assisted in any proceeding under the NYSHRL, regardless of whether such harassment is “severe or pervasive.” All such harassment will be considered unlawful when it subjects an individual to “inferior terms, conditions or privileges of employment because of an individual’s membership in [a protected class].”

The Faragher-Ellerth affirmative defense is effectively eliminated. Currently, this defense allows an employer to avoid liability for unlawful harassment if the employer has an effective complaint procedure in place, the employee unreasonably failed to utilize the complaint procedure and no adverse employment action occurred. Once this provision is effective, the fact that an employer had a complaint procedure that the employee failed to utilize will “not be determinative,” effectively eviscerating the Faragher-Ellerth defense.

The bill does permit an employer to avoid liability for harassment if it can show 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.

This provision of the bill takes effect 60 days after the bill becomes law.

- **NYSHRL’s protections expanded to domestic workers and independent contractors/subcontractors/vendors/consultants/other professional service providers**

Domestic workers and independent contractors (as well as subcontractors, vendors, consultants or others performing services at an employer’s workplace, collectively, “independent contractors”) will now be protected from claims of harassment based on any protected class. Additionally, independent contractors will also be protected from any other form of unlawful discrimination and employers will be liable for unlawful discrimination if the employer, its agents or its supervisors knew or should have known that such independent contractor was subjected to unlawful discrimination in the employer’s workplace and the employer failed to take immediate and appropriate corrective action.

This provision of the bill takes effect 60 days after the bill becomes law.

- **Punitive damages and attorneys’ fees authorized to prevailing parties in employment discrimination cases**

This provision of the bill takes effect 60 days after the bill becomes law.

- **Courts mandated to interpret the NYSHRL liberally**

The bill requires that courts now interpret the NYSHRL extremely liberally, regardless

of how similar federal laws have been construed, and mandates that courts narrowly construe exceptions to and exemptions from the NYSHRL. This amendment to the NYSHRL has the potential to cause one of the greatest impacts on discrimination claims under the State law, as courts will now be required to construe the NYSHRL as broadly as the New York City Human Rights Law.

This provision of the bill takes effect *immediately* after the bill becomes law.

- **Statute of limitations extended for sexual harassment complaints filed with the New York State Division of Human Rights from one (1) to three (3) years**

The new statute of limitations takes effect one (1) year after the bill becomes law

How Employers Should Prepare

This bill has serious ramifications for New York employers. In the short term, businesses must be cognizant of the bill's requirements about providing sexual harassment prevention policies and training materials in an employee's primary language. If employers are not using the State's model policy and/or model training material, they will need to translate these documents on their own.

Employers will also need to decide whether to include nondisclosure/confidentiality provisions in employment contracts, NDAs, separation agreements and settlement agreements that prohibit employees from discussing the underlying facts of future or current claims of discrimination. If confidentiality is important, these agreements will need to include special language to ensure such provisions are not deemed void – it is recommended employers discuss options with counsel.

Finally, while the law is unsettled on whether employers may continue to utilize arbitration agreements for discrimination claims, employers should also discuss with counsel the pros and cons of continuing to include such claims in their arbitration agreements.

In the long term, employers will contend with a tougher uphill battle when facing harassment claims. The bill dramatically lowers an employee's burden of proof and requires courts to interpret the NYSHRL liberally, and also effectively eliminates the Faragher-Ellerth defense—one of the primary weapons in an employer's arsenal when defending a harassment claim. Employees also have the time to file sexual harassment claims extended to three years after the alleged harassment occurred, and prevailing employees are authorized to collect punitive damages and attorneys' fees. The bill also expands the NYSHRL's protections to domestic workers and independent contractors.

While these changes are indeed dramatic, don't panic. Experienced counsel can help employers navigate these changes with minimal disruption to their business.

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