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New York State Expands Workplace Harassment and Discrimination Protections

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The authors of this article discuss sweeping changes to New York State laws prohibiting harassment and discrimination.

Governor Andrew M. Cuomo has signed into law sweeping changes to laws prohibiting harassment and discrimination (sometimes collectively, the Amendments). The Amendments build on New York State's 2018 initiative to combat sexual harassment and significantly expand and strengthen prohibitions against workplace discrimination and harassment.

ALL EMPLOYERS ARE COVERED

As amended, all prohibitions against discrimination and harassment of, the New York State Human Rights Law (NYSHRL) are extended to *all* employers within New York State. Prior to the Amendments, only employers with four or more employees were covered, except with respect to alleged sexual harassment. This change becomes effective February 8, 2020, 180 days after the Amendments became law and only applies to claims filed on or after that date.

LONGER COMPLAINT-FILING PERIOD

As of August 12, 2020, individuals will have three years within which to file an administrative complaint alleging sexual harassment with the

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New York State Division of Human Rights (NYSDHR). Other types of discrimination or harassment are still subject to a one-year administrative complaint-filing requirement.

POTENTIAL EXPANDED INDIVIDUAL LIABILITY

The NYSHRL now covers a "private employer," which "include[s] any *person*, company, corporation, labor organization or association," not a governmental entity. The inclusion of the word "person" within the definition of private employer may well result in direct employer individual liability under the NYSHRL for those who engage in discrimination, harassment, or retaliation. Currently, the NYSHRL provides, among other things, that an individual may be liable if he or she "aids" or "abets" conduct prohibited by the NYSHRL. This change is effective October 11, 2019, 60 days after the Amendments became law.

ELIMINATION OF 'SEVERE OR PERVASIVE' STANDARD

The NYSHRL long has been interpreted consistent with federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, as amended (Title VII). However, the Amendments instruct that the NYSHRL shall be construed liberally regardless of how comparable provisions in federal civil rights laws have been interpreted. Similarly, going forward, exceptions, and exemptions shall be construed narrowly.

The most significant impact of this change is the elimination of the requirement that targets of hostile environment harassment prove "severe or pervasive" conduct that altered their conditions of employment and created a hostile and abusive work environment. Effective October 11, 2019, harassment will be unlawful if an individual is subjected to "inferior terms, conditions or privileges of employment because of the individual's membership" in any protected category under the NYSHRL. This change aligns the NYSHRL more closely with the standard of the New York City Human Rights Law (NYCHRL), which requires that an individual prove that he or she was treated "less well" based on a protected category to establish employer liability, with the severity (seriousness) or pervasiveness (frequency) of the conduct relevant only to the amount of damages for which the employer may be liable.

The Amendments, however, include an affirmative defense to liability where "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." These provisions will take effect October 11, 2019, 60 days after the Amendments became law, and apply only to claims filed on or after that date.

ELIMINATION OF TWO-PART FEDERAL AFFIRMATIVE DEFENSE

Since the U.S. Supreme Court's 1998 decisions in *Burlington Industries, Inc. v. Ellerth*,[1] and *Faragher v. City of Boca Raton*,[2] an employer has been able to assert a two-part affirmative defense to shield itself from liability if a supervisor's sexually harassing conduct does not result in the target suffering a tangible job detriment by pleading and proving that: (i) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (ii) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Going forward, a person's failure to avail himself or herself of the employer's internal complaint process will not enable an employer to avoid liability under the NYSHRL. More specifically, effective October 11, 2019, 60 days after the Amendments became law, the "fact that such individual did not make a complaint about the harassment to such employer … shall not be determinative of whether such employer shall be liable."

EXPANDED DAMAGES AND ATTORNEYS' FEES

Under the Amendments, a prevailing complainant in a discrimination, harassment, and/or retaliation claim against a private employer is eligible to be awarded punitive damages. In addition, a prevailing party in an employment discrimination, harassment, or retaliation claim "shall" be awarded reasonable attorneys' fees. This replaces the existing rule that awarding attorneys' fees is discretionary. A prevailing employer, however, may only recover attorneys' fees if the employer demonstrates that the action or proceeding filed by the complainant was frivolous. These provisions take effect October 11, 2019, with respect to claims filed on or after such date.

INDIVIDUALS NEED NOT COMPARE THEMSELVES TO OTHERS

A central issue in many employment discrimination cases is whether the employer treated the plaintiff differently than it treated other employees who did not belong to the same protected category as plaintiff. For example, a plaintiff alleging gender discrimination may admit that she violated company policy, but claim that the employer subjected her to discipline that was more severe than the discipline meted out to male coworkers, and that it did so because she is a woman. In response, the employer might attempt to distinguish the plaintiff from the male comparators she has identified, or the nature or severity of the policy violations committed by the male comparators from the plaintiff's conduct,

and argue that because plaintiff cannot identify any appropriate comparators, she cannot establish gender discrimination. However, effective October 11, 2019, for claims filed on or after that date, the NYSHRL provides "[n]othing … shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared."

EXPANSION OF RULES PREVIOUSLY APPLICABLE ONLY TO SEXUAL HARASSMENT

Expanded Protections for Non-Employees

Last year, New York State law was amended to make an employer liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace with respect to sexual harassment, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. Effective October 11, 2019, this potential liability has been extended to include discrimination or harassment against such non-employees because they are members of any protected category.

Expanded Restrictions on Non-Disclosure Agreements

Also last year, New York State law was amended to limit the use of non-disclosure agreements in connection with the resolution of sexual harassment claims. Effective October 11, 2019, this limitation on the use of non-disclosure agreements applies to the settlement of all discrimination, harassment, and retaliation claims. Any such non-disclosure provision must be at the complainant's preference and must be written in "plain English, and if applicable, the primary language of complainant." Also effective October 11, 2019, any such non-disclosure provision shall be void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state or federal agency, or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid or other public benefits to which the complainant is entitled.

Moreover, the complainant must have a full non-waivable (i) 21 days in which to consider the agreement to enter into a non-disclosure provision and (ii) seven days after signing any such agreement to revoke it. As interpreted by the NYSDHR, this requires two separate documents — that is, an agreement which memorializes the preference of the complainant and which satisfies the above-noted 21-day

and seven-day periods, and whatever document incorporates that non-disclosure term as part of an overall settlement between the parties.

An Express Carveout for Speaking to Counsel and Government Authorities

In addition, all employment or other agreements entered into on or after January 1, 2020, must include an express provision advising the employee or potential employee that nothing prevents him or her from speaking to law enforcement, the Equal Employment Opportunity Commission, NYSDHR, a local anti-discrimination agency, or an attorney retained by such employee or potential employee about factual information related to any future claim of discrimination or harassment.

Broader Prohibition Against Pre-Dispute Compulsory Arbitration

For written contracts entered into after July 11, 2018, New York law generally prohibits pre-dispute mandatory arbitration provisions requiring the arbitration of sexual harassment claims. Effective October 11, 2019, this prohibition will be expanded to all harassment, discrimination, and retaliation claims. Employers, however, should anticipate Federal Arbitration Act (FAA) preemption challenges to the prohibition of pre-dispute compulsory arbitration of these claims.[3]

ADDITIONAL SEXUAL HARASSMENT POLICY MANDATES

At the time of hire and at every annual sexual harassment prevention training, every employer in New York will be required to provide employees with a notice containing such employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program. This notice must be in English and in the language identified by each employee as the primary language of such employee. New York State will publish model sexual harassment prevention policies in certain languages other than English. If New York State does not prepare a template in the language that the employee identifies as his or her primary language, then the employer need only provide the English-language notice. An employer will not be penalized for errors in the non-English notice provided by New York State. These changes are effective immediately.

Beginning in 2022, and every four years thereafter, New York State will review its then-current model sexual harassment prevention guidance document and sexual harassment prevention policy. Upon the completion of each such evaluation, an updated model sexual harassment

prevention guidance document and sexual harassment prevention policy will be issued, as needed.

EXPANDED HARASSMENT PROTECTION FOR DOMESTIC WORKERS

Under current law, domestic workers are protected against harassment based on gender, race, religion, sexual orientation, gender identity or expression, and national origin, where such harassment has the purpose or effect of unreasonably interfering with such domestic employee's work performance by creating an intimidating, hostile, or offensive working environment. Effective October 11, 2019, domestic workers will be able to bring harassment claims on the same basis as other employees.

GOING FORWARD

These are sweeping changes that will impact all employers throughout New York State. The Amendments strengthen prohibitions against workplace discrimination and harassment, including the substitution of the "inferior terms, conditions or privileges of employment" for the "severe or pervasive" standard and the elimination of the two-part affirmative defense. Moreover, since employees are no longer incentivized to make internal complaints under the NYSHRL, this places even greater importance on training and ensuring that employees, particularly supervisors and managers, understand what constitutes inappropriate workplace conduct and reporting obligations.

We remind employers that mandatory annual sexual harassment avoidance training has been required for private sector employers with 15 or more employees in New York City since April 1, 2019. Moreover, all New York State employers, regardless of the number of employees, must conduct anti-sexual harassment training for all employees by October 9, 2019, with annual training required thereafter.

NOTES

1. 524 U.S. 742 (1998).

2. 524 U.S. 775 (1998).

3. *See e.g.* Kindred Nursing Centers, L. P. v. Clark, 581 U.S. ___ (2017); Latif v. Morgan Stanley & Co. LLC., 2019 U.S. Dist. LEXIS 107020 (U.S. District Judge for the U.S. District Court for the Southern District of New York, Denise Cote, ruling that the 2018 prohibition of pre-dispute compulsory arbitration of sexual harassment claims was preempted by the FAA and noting that the same conclusion is warranted with respect to this part of the Amendments).