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Governor Cuomo Signs Legislation Enacting Significant Changes in New York State Sexual Harassment and Discrimination Law

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On August 12, 2019, Governor Cuomo signed legislation (S6577/A8421) that strengthens New York's existing workplace harassment and discrimination protections. The amendments to the New York State Human Rights Law ("NYSHRL") build on anti-harassment laws enacted in 2018 as part of the FY 2019 budget, discussed here, that, among other things, expanded workplace protections to contractors, subcontractors, vendors, consultants, and others providing services in the workplace, and required employers to adopt sexual harassment prevention policies and conduct annual, interactive sexual harassment prevention training for all employees by **October 9, 2019**. This legislation builds upon those protections and significantly expands the legal landscape for discrimination and harassment claims.

Comprehensive Summary

1. Covers all employers in the state.

Previously, except with respect to alleged sexual harassment, an employer with fewer than four (4) employees was not covered by the NYSHRL. Now, every employer within the state of New York is covered by the NYSHRL. "The term "employer" shall include all employers within the state, including state and all political subdivisions thereof." This change becomes effective on February 8, 2020.[1]

2. Amends the definition of "private employer."

The definition of "private employer" now includes any person, company, corporation, or labor organization, but not the state or any subdivision or agency thereof. This change becomes effective on October 11, 2019.

3. Expands protections against all forms of discriminatory harassment based on all protected categories.

In addition to protection from sexual harassment, non-employees, such as independent contractors, vendors, and consultants, are now protected from all forms of unlawful discrimination where the employer knew or should have known the non-employee was subjected to unlawful discrimination in the workplace and failed to take immediate and appropriate corrective action. This provision becomes effective on October 11, 2019.

4. Eliminates restriction that harassment be "severe or pervasive" in order to be legally actionable.

The burden of proof for harassment claims has been significantly lowered in New York State. Specifically, the legislation removes the requirement that complainants prove "severe or pervasive" conduct that altered their conditions of employment and created a hostile and abusive work environment.

Now, employers must address all forms of harassment in the workplace, including isolated instances. Specifically, under the NYSHRL, any harassment based on a protected class is unlawful "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." Unlawful harassment is now an actionable discriminatory practice "when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more" protected category. This definition of harassment applies to all protected characteristics including, but not limited to, age, race, creed, color, national origin, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, and sexual harassment.

Additionally, employees will no longer have to provide comparative evidence of another employee's treatment to prove a claim of harassment or discrimination. 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." This provision becomes effective on October 11, 2019.

5. Dilutes the *Faragher/Ellerth*

The legislation dilutes the *Faragher/Ellerth* affirmative defense, which is commonly used by employers to dismiss claims of sexual harassment. The defense was articulated in two U.S. Supreme Court cases regarding workplace harassment. Those rulings, handed down more than two decades ago, held that an employer is not liable for sexual harassment if it can demonstrate that: (a) the employer exercised reasonable care to prevent and correct promptly harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Now, under the new law, an employee's failure to invoke his or her employer's internal complaint procedure will not shield the employer from liability. That fact may still be raised by an employer defending against liability; however, effective October 11, 2019, 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."

6. Allows punitive damages and mandates attorneys' fees in employment discrimination cases.

Irrespective of forum, a prevailing plaintiff in an employment discrimination, harassment or retaliation case "shall" be awarded attorneys' fees. To be clear, attorneys' fees are now mandatory under the NYSHRL and are not discretionary. Conversely, attorneys' fees are only available to prevailing defendants if the claims brought against them were frivolous. Also, a prevailing plaintiff may be awarded punitive damages in a discrimination, harassment and/or retaliation case against private employers. These provisions become effective on October 11, 2019.

7. Expands the construction clause to require courts to interpret NYSHRL liberally.

The provisions of the NYSHRL will be construed liberally to accomplish the NYSHRL's remedial purposes, regardless of how federal civil rights laws have been construed. This will ensure that the NYSHRL is interpreted similarly to the New York City Human Rights Law (NYCHRL), as opposed to Title VII of the Civil Rights Act of 1964.

8. Significantly restricts the use of non-disclosure agreements.

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.claims.[2]

Effective October 11, 2019, this limitation now applies to the settlement of all discrimination, harassment and retaliation claims. Specifically, the law precludes the use of non-disclosure agreements that prohibit an individual from disclosing the facts and circumstances of a discrimination or harassment claim, unless: (i) the condition of confidentiality is in the complainant's best interest; (ii) any such non-disclosure provision is the complainant's preference and is written in "plain English, and if applicable, the primary language of complainant;" and the following three steps are followed:

1. The complainant must have 21 days from the date the provision is provided to him/her to consider it;
2. If the complainant, after considering the non-disclosure provision for 21 days, still prefers to enter into the agreement, such preference shall be memorialized in an additional agreement signed by all parties; and
3. The complainant must then have seven (7) days after executing the settlement agreement with a confidentiality provision to revoke the agreement. The settlement agreement is not effective or enforceable until the revocation period has expired.

Any term or condition in a non-disclosure agreement will be void if it prohibits the complainant from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits. Moreover, beginning on January 1, 2020, employment agreements that include non-disclosure provisions must include a carveout permitting the employee to speak 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 potential employee."

9. Expands the statute of limitations for Human Rights complaints.

As of August 12, 2020, the statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights is extended from one year to three years, which is the same amount of time an individual has to pursue a claim in court.

10. Prohibits mandatory arbitration clauses to resolve all discrimination cases.

Mandatory arbitration clauses will be prohibited to resolve all discrimination cases. Previously, arbitration clauses were prohibited to resolve sexual harassment cases. This provision becomes effective on October 11, 2019. However, this provision has been challenged as being in conflict with the Federal Arbitration Act ("FAA"). The United States District Court for the Southern District of New York recently found that the FAA pre-empts New York State Law. *Latif v. Morgan Stanley & Co. LLC, et al.,* No. 1:18-cv-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

Undoubtedly, appellate courts will weigh in on this issue.

11. Requires employers to provide employees with sexual harassment policies and sexual harassment training materials in English and employee's primary language.

Employers will be required to provide employees with their sexual harassment policies and sexual harassment training materials in English and in each employee's primary language, both at the time of hire and during each annual sexual harassment prevention training. The Department of Labor and the Division will also evaluate the impact of their model sexual harassment prevention policy and training materials every four years beginning in 2022 and will update the model materials as necessary.

Going Forward

Once again, employers are advised to promptly review and, if necessary, update their workplace policies to ensure compliance with various federal, state and local sexual harassment and discrimination laws. Moreover, employers are also reminded that all New York State employers, regardless of size, must conduct sexual harassment prevention training for all employees by **October 9, 2019**, with annual training thereafter.

If you have questions regarding discrimination or harassment, sexual harassment prevention training options, or any other aspect of employment law, feel free to contact **Hayley B. Dryer** at **(516) 357-3745** or via email at **hdryer@cullenanddykman.com** or **James G. Ryan** at **(516) 357-3750** or via email at **jryan@cullenanddykman.com** or **Thomas B. Wassel** at **(516) 357-3868** or via email at **twassel@cullenanddykman.com**.

** Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.*

[1] Unless otherwise noted, the amendments to the law become effective immediately.

[2] N.Y. General Oblig. Law §5-536; N.Y. CPLR 5003-b.

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