



New York Lawmakers Pass Game-Changing Reforms to State Discrimination Laws

Insights

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Still grappling with the expansive sexual harassment reforms passed last year, New York businesses and employers will soon need to manage through yet another expansive suite of amendments that will continue the state's ongoing implementation of stronger, and more burdensome, antiharassment and antidiscrimination laws. On the last day of its legislative session, the New York State Senate and Assembly passed sweeping reforms meant to overhaul the state's antidiscrimination laws. Governor Andrew Cuomo, who advocates for more robust workplace harassment laws, is expected to sign the bill. Once enacted, the amendments will impact every workplace in New York.

[Ed. Note: Governor Cuomo signed the bill into effect on August 12, 2019.]

What Does The Legislation Entail?

The legislation is an omnibus bill that amends different provisions of the New York State Human Rights Law (NYSHRL), the General Obligations Law, the Civil Practice Law and Rules, and the New York Labor Law. Together, these amendments provide for significant changes to New York's already expansive workplace harassment laws. Specifically, the bill provides for the following:

Expansion Of Coverage Under The NYSHRL To Small Employers

Currently, the NYSHRL only applies to New York employers with four or more employees, except for claims involving discrimination based on sex, which currently apply to all sized employers. Under the amended law, the NYSHRL will apply to even the smallest New York employers, effective 180 days after the bill becomes law. The amendment will apply only to claims filed on or after the effective date.

[Ed. Note: The effective date will be February 8, 2020.]

Lowering The Standard For Harassment Claims

Under long-standing precedent, conduct must be "severe or pervasive" to be considered harassment, which is a relatively high standard. The amendments will eliminate the current standard for sex harassment claims – as well as harassment and retaliation claims alleging misconduct based on any protected characteristic.

Going forward, the law significantly lowers the bar for workers to establish a claim for harassment based on age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed discrimination or filed a complaint, testified, or assisted in any proceeding regarding discrimination.

Additionally, the amendments erode a longstanding employer defense to harassment claims. Known as the *Faragher-Ellerth* defense (based on two U.S. Supreme Court decisions from 1998), an employer is able to defeat a federal harassment claim if the employee failed to take advantage of preventative or corrective opportunities provided by the employer, such as failing to report alleged misconduct despite the employer's maintenance of an appropriate reporting mechanism. Under the amendments, the fact that an employee did not make a complaint about the harassment "shall not be determinative" of an employer's liability, bringing the NYSHRL in line with its city counterpart, the NYCHRL.

Finally, the amendments codify a narrow affirmative defense for employers, where the employer can establish that the alleged harassment does not rise above the level of "petty slights or trivial inconveniences," viewed through the lens of a reasonable victim of discrimination with the same protected characteristic as the complainant.

These provisions will take effect 60 days after the bill becomes law, and will not apply retroactively to previously filed claims. There is already an [amendment to this bill](#) that has been passed by the Senate, but not yet the Assembly, that would clarify that the new laws will only apply to claims that *accrue* after the effective date. The Assembly's failure to act will create a strong likelihood that informed employees whose claims are based wholly on pre-amendment conduct will simply wait to file so as to gain the benefits of the amendments.

[Ed. Note: The effective date will be October 11, 2019; the amendment to the bill mentioned above also passed and was signed on August 12, confirming the new laws will apply only to claims that accrue after the effective date.]

Extension Of Harassment Protections To Non-Employees

Last year, New York expanded coverage of the state's sexual harassment laws to non-employees in the workplace. The new legislation goes further, extending all of the state's antiharassment laws to non-employees. Businesses will now be liable for harassment directed towards contractors, subcontractors, vendors, consultants, or any other person providing services in the workplace, so long as the business, its agents, or supervisors "knew or should have known" the non-employee was harassed in the workplace, and failed to take appropriate corrective action. This provision will take effect 60 days after the bill is enacted, and will only apply to claims filed after the effective date.

[Ed. Note: The effective date will be October 11, 2019.]

Additional Damages For Employment Harassment

Currently, the NYSHRL does not provide for awards of attorneys' fees or punitive damages to a successful claimant. The amendments will allow recovery of both.

These provisions will take effect 60 days after the bill becomes law, and will not apply retroactively to claims filed prior to that date. Note that there is already a bill passed by the Senate, but not yet the Assembly, to soften this provision by making an award of attorneys' fees discretionary, rather than mandatory.

Prohibition Of Confidential Settlements And Mandatory Arbitration Agreements

The 2018 expansion of New York's sexual harassment laws already prohibited the inclusion of non-disclosure clauses in settlement of sexual harassment claims, unless the alleged victim explicitly wanted the clause. The current amendments expand this prohibition to include any type of discrimination claim.

Confidentiality language may only be included if that is the employee's expressed preference. They must be given at least 21 days to consider whether to accept confidentiality language, and then has seven days to revoke that acceptance. Further, any such non-disclosure term will be void if it prohibits the individual from participating in an investigation with the Equal Employment Opportunity Commission (EEOC), New York State Division of Human Rights (NYSDHR), or similar local agency, or if restricts the disclosure of any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the individual may be entitled. These provisions will take effect 60 days after the law is enacted.

Similarly, the new law extends last year's prohibition against contracts that mandate arbitration of sex harassment claims to claims involving *any* type of discrimination. It is yet to be seen whether and to what extent this provision will be enforceable in light of the Federal Arbitration Act, and legal challenges are expected. This law will take effect 60 days after the bill is signed into law.

Finally, the law extends confidentiality prohibitions beyond the settlement context. The legislation renders void any contractual agreement between an employer and any employee or potential employee that prevents disclosure of factual information related to any future claim of discrimination, unless the provision notifies the employee that they are not prohibited from speaking with law enforcement, the EEOC, the NYSDHR, a local human rights agency, or an attorney retained by the employee. This provision will apply to contracts entered into on or after January 1, 2020.

[Ed. Note: The effective date will be October 11, 2019.]

Expansion Of Sexual Harassment Training And Policy Requirements

Last year's sexual harassment laws ushered in mandatory sexual harassment policy and training obligations and standards. The current legislation constructs additional administrative hurdles.

The new requires that at both the time of hire and at every annual sexual harassment training, employees must receive a notice containing a copy of the employer's sexual harassment policy, as

well as the information presented at the employer's harassment prevention training (in English and in the primary language of the employee). This provision will take effect immediately upon enactment.

Extended Statute Of Limitations

Under current state law, an individual must file a NYSHRL claim with the Division of Human Rights within one year, but has three years to file in court. Under the amendments, the three-year limit will apply to complaints filed directly with the Division as well. This will take effect one year after enactment.

[Ed. Note: The effective date will be August 12, 2020.]

Regular Updating Of Model Policy And Training

As part of the law requiring all employers to adopt a sexual harassment prevention policy and to conduct sexual harassment prevention training, the New York State Department of Labor and the NYSDHR were tasked with developing both a model sexual harassment policy and model training program. The models were released in August 2018. Under the new amendments, the NYDOL and NYSDHR must reevaluate and update the models every four years, beginning in 2022.

What Should New York Employers Do Now?

These sweeping reforms will impact every employer and business in the state. You must be prepared for strengthened laws aimed at targeting harassment in the workplace. Lowering the high bar of having to prove "severe and pervasive" behavior will make it easier for employees to bring harassment claims in court, and your use of the *Faragher-Ellerth* defense will be limited. Coupled with punitive damages and attorneys' fee awards, we expect to see an increase in workplace harassment lawsuits.

It is imperative that you take measures to ensure your workplaces are free from discrimination and harassment. Additionally, you may need to revise existing arbitration agreements, standard settlement agreements, or any contract with employees that requires confidentiality. You must also be sure to take the steps necessary to meet the additional administrative requirements associated with the mandatory sexual harassment policy and training.

We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting New York employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our New York City office.

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