SEYFARTH SHAW

# Management Alert

## New York State Legislature Passes Major Amendments To Anti-Discrimination and Anti-Harassment Laws

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***Seyfarth Synopsis:*** *The New York State Legislature has passed, and Governor Andrew M. Cuomo is expected to sign, a bill amending the state's anti-discrimination and anti-harassment laws. The legislation significantly expands the protections to employees by, among other things, removing the long-standing "severe or pervasive" standard for workplace harassment claims, eliminating the Faragher/Ellerth affirmative defense to harassment claims, providing punitive damages and attorneys' fees as potential forms of recovery under the law, prohibiting NDAs in settlement agreements with respect to the facts and circumstances underlying claims of any form of discrimination or harassment, and prohibiting mandatory pre-dispute arbitration agreements for any form of discrimination or harassment.*

On June 19, 2019, the New York State Legislature passed S6577/A8421, which Governor Cuomo is expected to sign soon. The proposed legislation builds on New York State's sweeping revisions to the sexual harassment laws that were passed in 2018, discussed here and here. The provisions in the bill impacting private employers are summarized below. Employers should pay particular attention to the effective dates for each provision of the law, which differ.

### New York State's Human Rights Law Will Now Apply to All Employers

As written, the new legislation expands the definition of "employer" to encompass all private employers, regardless of size. Previously, only employers with four or more employees were covered by the law (except as to sexual harassment, where the employee threshold had been lowered to one employee in 2015).

*Effective date*: 180 days after enactment.

### Eliminates The Severe or Pervasive Standard for Harassment

The law eliminates the "severe or pervasive" standard that has been the legal standard applicable to hostile work environment claims under both the federal and New York State anti-harassment laws. Now, harassment based on any protected characteristic (and retaliatory harassment) is unlawful so long as such conduct "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more" protected characteristics, "*regardless of whether such harassment would be considered severe or pervasive.*" Tracking the text of the New York City Human Rights Law, the proposed law provides that it is an affirmative defense to liability "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." The adoption of the City law's language strongly suggests the Legislature's intention to align the standard for harassment cases brought under the New York State Human Rights Law with the much lower legal standard applicable under the New York City Human Rights Law.

This section of the bill also provides that "[n]othing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared."

The bill also extends the foregoing protections to domestic workers.

*Effective date*: 60 days after enactment.

## Does Away With the *Faragher/Ellerth* Defense

The proposed legislation also eliminates a common affirmative defense upon which employers have relied in cases involving claims of supervisor harassment, known as the *Faragher/Ellert*h defense. This defense applies under federal law (and previously applied under New York State law) in circumstances of supervisor harassment, when the employee did not file a complaint and the alleged harassment did not result in tangible employment action (such as termination). If applicable, *Faragher/Ellerth* prevents plaintiffs from imputing liability to an employer for the claimed harassment. The New York State Human Rights Law now provides that "[t]he fact that the individual did not make a complaint about the harassment to the employer shall not be determinative of whether the employer shall be liable."

*Effective date*: 60 days after enactment.

## Extension of Protections to Non-Employees

The proposed law amends Section 296-d of the Executive Law, which was passed in 2018, and extended the protections of the State Human Rights Law to certain "non-employees" (including contractors, vendors, or consultants), but only for sexual harassment claims. As amended, it expands protections to "non-employees" for all forms of discrimination, irrespective of the protected characteristic. Thus, employers may now be liable to non-employees "when the employer, its agents, or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action." The extent of the employer's control and other legal responsibility over alleged wrongdoer remain factors courts may consider in determining liability.

*Effective date*: 60 days after enactment.

## Punitive Damages Are Now An Available Remedy

The proposed law will allow punitive damages to be available as a remedy in all "cases of employment discrimination related to private employers" brought under the New York State Human Rights Law.

*Effective date*: 60 days after enactment.

## Attorneys' Fees Are Mandatory

The proposed legislation provides that any prevailing party "shall" be awarded attorneys' fees, whether the claim is before a court or the State Division of Human Rights. Moreover, if the employer is the party seeking such fees, it is required to show, by motion, that the action brought by the plaintiff was frivolous — meaning that the action was filed or pursued in bad faith.

*Effective date*: 60 days after enactment.

## The New York State Human Rights Law Is To Be Liberally Construed

The law requires that the State Human Rights Law be construed "liberally," even when such construction would diverge from that of "federal civil rights laws, including those laws with provisions worded comparably," and that exceptions to the law should be construed narrowly "in order to maximize deterrence of discriminatory conduct."

*Effective date*: immediately upon enactment.

## Prohibition of Nondisclosure Agreements in Settlement Agreements for All Discrimination Cases

Last year, New York amended the General Obligations Law and the Civil Practice Laws and Rules to prohibit employers from including NDAs in settlement agreements resolving claims of sexual harassment (unless confidentiality was the claimant's preference). The new legislation extends that prohibition to all claims of discrimination. As with last year's amendments, the current bill prohibits only NDAs that "would prevent the disclosure of ***the underlying facts and circumstances*** to the claim or action," and does not affect an employer's right to include an NDA that prohibits disclosure of the fact of the agreement or the settlement amount. Additionally, and similarly consistent with the 2018 version, the law includes an exception if confidentiality is the complainant's preference. In that circumstance, the parties may agree to include an NDA that prohibits disclosure of the underlying facts and circumstances of the claim. However, the NDA must be written in "plain English, and, if applicable, [in] the primary language of the complainant." The complainant must also be provided a non-waivable 21-day period to consider the language of the NDA and a 7-day revocation period.

Even where the parties agree to include an NDA that prohibits disclosure of the underlying facts and circumstances of the claim, the provision will be deemed void to the extent that it "prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (i) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled.

*Effective date*: 60 days after enactment.

## NDAs Regarding Future Claims of Discrimination Void

The bill provides that any provision in any contract or agreement between an employee and employer "that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable." Again, however, there is an exception: such a provision may be included in an agreement, so long as the provision "notifies the employee or potential employee that it does not prohibit him or her from speaking 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."

*Effective date*: Applies to contracts entered into on and after January 1, 2020.

## Prohibition of Mandatory, Pre-Dispute Arbitration Agreements

In 2018, New York amended the General Obligations Law to prohibit mandatory arbitration of sexual harassment claims. This prohibition has now been extended to prohibit mandatory pre-dispute arbitration of any claim of discrimination, not just sexual harassment. As discussed in a prior alert, this provision is likely preempted by the Federal Arbitration Act.

*Effective date*: 60 days after enactment.

## Distribution of a Written Notice

Last year, New York State required that all employers: (i) provide all employees with a sexual harassment prevention policy and (ii) provide employees with annual, interactive sexual harassment prevention training. New York also prescribed certain minimum substantive requirements for the policy and the training. The new bill will require employers to provide employees with a written notice, both "at the time of hiring and during every annual sexual harassment prevention training," that contains the "employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program." The notice must be provided in English and in the language identified by any employee as their primary language (provided the State's model exists in that language).

*Effective date*: immediately upon enactment.

## Extended Statute of Limitations for Sexual Harassment Claims

The new legislation extends the statute of limitations to three years for employees to file a claim of sexual harassment under state law with the State Division of Human Rights. The legislation does not affect the statute of limitations for employees to file state law sexual harassment claims in court, which also is three years. Claims for all other forms of discrimination and harassment are still subject to a one-year statute of limitations when filed with the State Division of Human Rights.

*Effective date*: one year after enactment.

**Next Steps:** The new legislation makes major amendments to New York's discrimination and harassment laws and employers should be aware of these changes. In terms of initial steps employers should consider the following:

- Employers should consider reviewing their discrimination, harassment and retaliation policies to ensure they are in compliance, and further consider expanding protections to non-employees beyond just sexual harassment.
- Prepare the required "notice" containing the employer's sexual harassment prevention policy and the information presented at the sexual harassment prevention training program, which will be particularly important with the upcoming training deadline of October 9, 2019, and ensure this "notice" is provided to all employees at the time of hiring.
- Be aware of the changes to NDAs in settlement agreements and ensure compliance for any discrimination and harassment claims regardless of protected characteristic settled after 60 days of the enactment of the law. Similarly, as of January 1, 2020, employers should ensure any employment contracts with NDA's that apply to future claims of discrimination include the required carve out language.
- Assess any mandatory pre-dispute arbitration agreements and strategy as to enforcing such agreements in light of likely pre-emption under federal law.
- Carefully assess litigation strategies in light of the lower burdens of proof and new forms of damages available for claims brought under the New York State Human Rights Law.

As always, Seyfarth Shaw LLP and its attorneys are available to assist employers with ensuring compliance with this new legislation. If you have any questions or would like further information, please contact your Seyfarth attorney, Gena B. Usenheimer at gusenheimer@seyfarth.com, Anne R. Dana at adana@seyfarth.com, or Nila Merola at nmerola@seyfarth.com.

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