

New York State Passes Game Changing Legislation Expanding Workplace Harassment and Discrimination Laws

At the close of the legislative session, the New York State Legislature passed a series of bills having a broad impact upon the state's anti-discrimination and anti-harassment laws. The changes in law expand upon the sexual harassment reforms enacted last year and further amend the New York State Human Rights Law ("NYSHRL"). When this legislation becomes effective, it will impact every employer in New York State.

Expanding Coverage of the NYSHRL to All Employers

Currently, the NYSHRL applies only to employers with four (4) or more employees, except for claims of sex based discrimination, which applies to all employers regardless of size. Under the new amendments, the entire NYSHRL will now apply to all employers, regardless of size.

Changes to the Burden of Proof and Viable Defenses in Harassment Claims

To establish a claim of harassment under current law, an employee must demonstrate that the alleged conduct was "severe and pervasive." The new NYSHRL amendments eliminate this standard. An employee now needs only to establish that the alleged conduct subjected them to inferior terms, conditions or privileges of employment because they are a member of a protected class. Moreover, the NYSHRL is now to be construed liberally to maximize deterrence of discriminatory conduct, even if such construction differs from federal law.

The NYSHRL amendments also diminish a long standing defense to harassment claims. Previously, the *Faragher-Ellerth* defense allowed an employer to defeat a claim of harassment if it provided a procedure for reporting complaints of harassment, but the employee failed to follow the procedure, thus depriving the employer of the ability to address the alleged harassment. Now, an employee's failure to complain is not determinative of an employer's liability.

Additionally, the NYSHRL amendments now expressly permit an employer to avoid liability for harassment when the employer can establish that the alleged conduct does not rise above the level of petty slights or trivial inconveniences, as viewed through the lens of a reasonable victim of discrimination who is a member of the same protected class.

Harassment Protections Expanded to Domestic Workers and Non-Employees

Last year, the state sexual harassment laws expanded the protections against sexual harassment to non-employees, such as contractors, vendors and consultants. The new law further expands the state's anti-harassment laws and now protect domestics workers and non-employees from harassment based upon any protected characteristic. Thus, employers will now be liable for harassment of domestic workers, contractors, subcontractors, vendors, consultants and any others providing services in the workplace so long as the business knew or should have known that the individual was subjected to harassment in the workplace and took no corrective action.

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Expanded Damages

While the NYSHRL currently does not allow successful claimants to recover punitive damages or attorneys' fees, under the NYSHRL amendments successful claimants can recover punitive damages and "shall" be awarded attorneys' fees.

Confidential Settlements and Mandatory Arbitration Agreements Prohibited

Last year's changes to the NYSHRL prohibited non-disclosure clauses in settlement agreements for sexual harassment claims, unless the alleged victim expressly wanted such a clause. The new NYSHRL amendments expand this provision to cover all discrimination claims. As a result, confidentiality clauses may only be included in settlement agreements resolving discrimination claims where the alleged victim expressly desires such a clause. Moreover, the individual must be given at least 21 days to review the agreement and 7 days to revoke the agreement after signing it. Significantly, any confidentiality language must expressly permit the individual to participate in an investigation with law enforcement agencies, the Equal Employment Opportunity Commission ("EEOC"), the New York State Division of Human Rights ("NYSDHR") and similar local agencies as well as to speak to an attorney retained by the employee. Absent such a carve out, the confidentiality language is void. The confidentiality language must also permit the individual to provide facts necessary to receive unemployment benefits, Medicaid or any other public benefit to which the employee may be entitled. Further, the language must be both in English and the employee's primary language.

The new law also expands last year's prohibition of mandatory arbitration provisions in contracts to resolve complaints of sexual harassment. More particularly, pursuant to the NYSHRL amendments, any agreement that requires mandatory arbitration of any discrimination claims will be prohibited. Notably, however, just days after this legislation was passed, the United States District Court for the Southern District of New York ruled that the prohibition on mandatory agreements to arbitrate harassment claims is preempted by the Federal Arbitration Act and, therefore, invalid. As a result, any such arbitration agreements may potentially be deemed enforceable should they be challenged in court (absent their unenforceability on other grounds).

Finally, the NYSHRL amendments expand confidentiality prohibitions beyond the settlement context. Under the amendments, any contractual provision between an employer and an employee or potential employee that precludes disclosing facts related to any future claim of discrimination is deemed void, unless the language advises the employee or potential employee that they are not prohibited from speaking with law enforcement, the EEOC, the NYSDHR, similar local agency, or an attorney retained by the individual.

Expanded Sexual Harassment Training and Policy Requirements

Employers must now provide their sexual harassment policy to employees in English and their native language at the time of hire and at their annual sexual harassment training seminar. However, if the state does not publish a model sexual harassment policy in the language identified by an employee as their primary language, the employer need only provide the policy to that employee in English. Employers must also provide employees with a copy of the training materials presented to employees at their sexual harassment training.

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Expanded Statute of Limitations to File Claims with the New York State Division of Human Rights

The legislation extends the time period to file a claim of sexual harassment with the New York State Division of Human Rights from one (1) year to three (3) years.

Expanded Definition of Race Discrimination

The definition of “race” within the Education laws and NYSHRL has been amended to include “traits historically associated with race, including, but not limited to, hair texture and protected hairstyles.” The phrase protected hairstyles refers to styles such as braids, locks, and twists. This mirrors legislation passed earlier this year by the City of New York .

What Should Employers do Next?

While these revisions to the law will have a significant impact on all New York workplaces, employers can prepare to address the changes. Employers should review their workplace harassment, discrimination, and dress code/appearance policies and ensure that their sexual harassment training programs are set up to comply with the new requirements. Employers should also review their standard forms to ensure they do not run afoul of the new rules regarding confidentiality. We recommend that employers take these steps as soon as possible because, once enacted, some of these changes go into effect immediately while others will go into effect over time.

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