LOEB & LOEB LLP

Employment and Labor

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New York State amends workplace discrimination, harassment and retaliation laws

Building on sexual harassment reforms, New York State recently expanded its protections against workplace discrimination, harassment and retaliation by amending various New York laws, including the New York State Human Rights Law (NYSHRL), the New York General Obligations Law and the Civil Practice Law. The amendments, which were signed into law on Aug. 12, 2019, contain several significant provisions impacting private employers. In addition to making it easier for employees and nonemployees to bring and prevail on claims of discrimination, harassment and retaliation, the new amendments will require employers to follow certain procedures with new hires and amend their forms of employment and confidentiality and settlement agreements. Specifically, the new amendments provide for the following:

(a) **Employers of All Sizes Are Covered**. The NYSHRL will now cover employers of all sizes. The previous iteration of the statute covered only employers with four or more employees. This particular provision goes into effect on Feb. 8, 2020.

(b) **Lower Burden of Proof**.

- The amendments lower the burden of proof for all claims filed under the NYSHRL (regardless of the protected class on which they are based) from "severe and pervasive" to rising above the level of "petty slights and trivial inconveniences," resembling the existing standard under the New York City Human Rights Law (NYCHRL). This change takes effect on Oct. 11, 2019 (as does item (b) below).
- **Identifying Similarly Situated Comparators Is Unnecessary**. Employees are no longer required to identify a similarly situated comparator to show that they were treated less favorably than someone outside of the relevant protected category.

(c) ***Faragher/Ellerth* Defense Is Limited**. Before enactment of the new law, employers could avoid liability for certain types of sexual harassment claims under what was called the *Faragher/Ellerth* defense, which could be used when the plaintiff/complainant did not utilize the company complaint procedure, thereby depriving the employer of the ability to prevent the alleged harassment. The new law provides that an employee's failure to file an internal complaint "shall no longer be determinative" of whether his or her employer is liable. This provision resembles the existing standard under the NYCHRL.

(d) **Employer Liability Expanded to Contractors**. Nonemployees, such as independent contractors, vendors and consultants, will now be protected from unlawful discriminatory practices in the

employer's workplace when the nonemployee makes the employer aware of such practices and the employer fails to take prompt and effective remedial action. This change goes into effect on Oct. 11, 2019.

(e) **Domestic Worker Protections Expanded**. Harassment of domestic workers will now be prohibited with respect to all protected classes and governed by the same burden of proof that applies to all other types of employees under the NYSHRL. This change goes into effect on Oct. 11, 2019.

(f) **Punitive Damages**. Punitive damages are now available as a remedy for all claims under the NYSHRL. This change goes into effect on Oct. 11, 2019.

(g) **Attorneys' Fees for Prevailing Party**. The law now provides that attorneys' fees "shall" be awarded to prevailing claimants/plaintiffs. If a respondent or defendant is the prevailing party, then fees will be awarded only if it can be shown that the claims brought were "frivolous." This change goes into effect immediately upon the law's enactment.

(h) **Liberal Construction to Maximize Deterrence**. The NYSHRL will now be construed liberally and exceptions narrowly to "maximize deterrence of discriminatory conduct." This construction is required even if it results in a divergence from federal law, and such change goes into effect immediately upon the law's enactment.

(i) **Nondisclosure Agreements**. The amendments impact nondisclosure agreements in settlements and employment contracts.

- **Settlement Agreements**. Similar to what was previously the case for sexual harassment claims only, nondisclosure provisions are now prohibited from inclusion in settlement agreements with respect to all claims of discrimination, harassment and retaliation under the NYSHRL, unless it is the complainant's preference. Such preference must be written into the agreement in plain language, "and, if applicable, the primary language of the complainant." If the complainant prefers confidentiality, the complainant must be given 21 days to consider the agreement and, after execution, be given seven days to revoke the agreement. This change goes into effect 60 days after the law's enactment. The new law also requires that the settlement agreement not prohibit or otherwise restrict the complainant from (i) initiating or participating in any manner with an investigation conducted by an appropriate local, state or federal civil rights enforcement agency, or (ii) filing or disclosing any facts necessary to obtain unemployment insurance, Medicaid or other public benefits to which the complainant is entitled.
- **Employment Agreements**. Beginning on Jan. 1, 2020, employment contracts containing nondisclosure provisions must include a specific carve-out to allow the employee to disclose factual information related to any claim of discrimination to law enforcement, the U.S. Equal Employment Opportunity Commission, the New York State Division of Human Rights or any local commission on human rights (such as the New York City Commission on Human Rights), or an attorney retained by the employee.

(j) **Mandatory Arbitration Clauses Prohibited**. New York's prohibition against mandatory arbitration clauses for sexual harassment claims has been expanded to include discrimination and retaliation claims. This change will go into effect 60 days after the law's enactment, but is likely preempted by federal law, as was held in the recent federal case Latif v. Morgan Stanley & Co., LLC.

(k) **Distribution of Anti-Harassment Policy**. Employers must provide employees with their written sexual harassment policies and training materials, in English or the employee's primary language if provided by the state, at the time of hire and during the required annual training.

(l) **Statute of Limitations**. The statute of limitations will be expanded from one year to three years for sexual harassment complaints filed with the New York State Division on Human Rights. This change goes into effect on Aug. 12, 2020.

What Employers Should Do Now

The legislation has considerable practical implications for New York employers, particularly employers outside of New York City. New York employers should consider taking the following actions:

- Review all policies relating to the NYSHRL to ensure that policies are compliant, including posting requirements.
- Update training materials to reflect changes in the law.
- Immediately begin distributing anti-harassment and anti-discrimination policies to existing employees and new hires.
- Educate managers on updates in the law and provide training to existing employees and new hires.
- Review employment contracts and onboarding materials, especially arbitration agreements, nondisclosure agreements, and other confidentiality provisions that implicate any type of discrimination, harassment or retaliation claim, to determine whether they are consistent with the new requirements.

Related Professionals

For more information, please contact:

Christopher Binns cbinns@loeb.com
Mark Goldberg mgoldberg@loeb.com

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