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CLIENT ALERT

# New York Substantially Expands Its Anti-Discrimination and Anti-Harassment Laws

AUGUST 30, 2019

On October 11, 2019, dramatic changes to the New York Human Rights Law (NYHRL) will go into effect as a result of amendments to the law signed by Governor Cuomo earlier this month. Building on changes to the NYHRL introduced via the budgetary process last year (see our prior briefing here), these amendments bring the rights and remedies available under NYHRL in line with (and, in some cases, beyond) its New York City counterpart, the New York City Human Rights Law (NYCHRL).

The amendments expand the coverage of the NYHRL to all private employers in the state, irrespective of size. The amendments also substantially increase the reach and scope of the NYHRL, including by (i) relaxing the standard for actionable conduct and limiting defenses available to employers in harassment claims of all types, (ii) extending the statute of limitations for sexual harassment claims, (iii) extending prohibitions on non-disclosure and mandatory arbitration agreements to all claims of discrimination and harassment, (iv) expanding the monetary relief available to successful complainants, and (v) implementing new notice and training requirements.

Relaxed Standard for Actionable Conduct and Limitation of Defenses

The amendments jettison the familiar "severe or pervasive" standard for harassment claims— for both sexual harassment and harassment based on any other protected characteristic. Under the "severe or pervasive" standard, a complainant could prevail on a harassment claim only where he or she could establish that the complained-of conduct was so severe (extreme), or pervasive (frequent), as to pollute the working environment, thereby altering the conditions of the complainant's employment. The amendments substantially lower the bar for harassment claims such that a complainant need show only that the complained-of conduct subjects him or her to "inferior terms, conditions or privileges of employment because of the individual's membership in one or more protected classes."

Not only do the amendments substantially lower the threshold of actionable conduct, but they also take away a key affirmative defense historically available to employers in harassment claims. Under both federal law and the pre-amendment NYHRL (but not the NYCHRL), an employer could avoid liability for harassment if the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and showed that the complainant unreasonably failed to take advantage of the preventative or corrective opportunities (the so-called Faragher-Ellerth defense based on the U.S. Supreme Court's decisions in *Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth*). The amendments do away with this affirmative defense. Now, similar to the NYCHRL, the only

affirmative defense that will be available to employers under the NYHRL will be that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristics would consider petty slights or trivial inconveniences."

Extended Statute of Limitations

Prior to the amendments, all claims under the NYHRL were required to be brought within one year of the allegedly discriminatory conduct. The amendments will extend the statute of limitations for claims of sexual harassment in employment to three years. The one-year statute of limitations is retained for all other claims under the NYHRL. This change in the law will become effective August 12, 2020.

Additional Limitations on Non-Disclosure and Arbitration Agreements

In last year's budget, New York implemented restrictions on the use of non-disclosure agreements in sexual harassment cases. The recent amendments extend these restrictions to all discrimination claims under the NYHRL. As amended, the NYHRL will prohibit employers (and their officers and employees) from including in a settlement or other agreement any term that would prevent the complainant from disclosing the facts and circumstances underlying his or her claim of discrimination or harassment, unless such a confidentiality provision is the complainant's preference. Where inclusion of such a non-disclosure provision is the complainant's preference, the complainant must have 21 days to consider such provision, and then a further period of at least seven days to revoke the agreement.

The amendments also purport to ban any agreement or provision requiring the mandatory arbitration of discrimination or harassment claims under the NYHRL. As we noted with respect to last year's budget provisions (which banned mandatory arbitration of sexual harassment claims), we do not expect this ban to have much impact unless there is a change in arbitration law at the federal level. Until such a change, we expect that the NYHRL's ban on mandatory arbitration will be preempted by the Federal Arbitration Act (FAA) for any arbitration agreement governed by the FAA. The FAA "preempts any state rule that discriminates on its face against arbitration"—for example, a law prohibiting outright the arbitration of a particular type of claim—or a state rule "that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark,* 137 S.Ct. 1421, 1423 (2017). We continue to recommend that New York employers ensure that their arbitration agreements are expressly governed by the FAA if they plan to avoid the reach of the NYHRL's ban.

Expansion of Monetary Relief Available

As a result of the amendments, punitive damages and attorney's fees will be available to successful complainants under the NYHRL. Punitive damages were previously unavailable under the NYHRL for claims of employment-based discrimination or harassment, and attorney's fees were available only for sexual harassment claims.

Expanded Notice and Training Requirements

All New York employers will now be required to provide employees with a "notice" containing (i) the employer's sexual harassment prevention policy, and (ii) the information presented at the employer's sexual harassment prevention training program. This notice is to be provided at the time of hire and at each annual sexual harassment prevention training program, in both English and in the employee's primary language.

Employers previously were required to provide employees with a copy of the employer's sexual harassment prevention policy and with training. While the amendments now require that a "notice" also be provided, they do not specify what should be contained in the notice beyond the policy and training program information. We are hopeful that the Department of Labor, which is charged with preparing template policies and training programs in English and various other languages, will soon provide clarity on this issue.

Employers of all sizes who maintain operations in New York should review their current policies, practices, forms, and agreements to ensure compliance with the newly amended NYHRL, paying particularly close attention to areas where the NYHRL's new requirements differ from those under the pre-amendment law.

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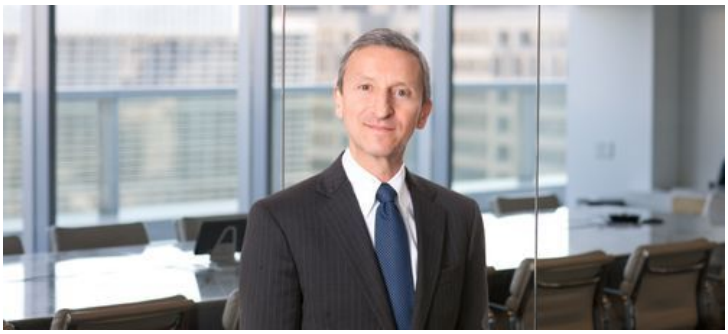

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